Supreme Court, U.S.
FILED
NOV 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-226

IN THE

Supreme Court of the United States

October Term, 1988

BENJAMIN R. WARD, in his official capacity as Police Commissioner of the City of New York; GEORGE SCARPELLI, in his official capacity as Chief of Operations for Department of Parks; SHELDON HOROWITZ, in his official [capacity] as Special Events Director for the Department of Parks; ROBERT RUSSO, in his official capacity as Assistant Parks Commissioner for Citywide Services, New York City Department of Parks and Recreation; JOSEPH KILLIAN, in his official capacity as Program Director for the Mall Bandshell of the Bethesda Terrace area of Central Park in the City of New York, Department of Parks and Recreation; MAYOR EDWARD KOCH, in his official capacity as the Mayor of the City of New York; and THE CITY OF NEW YORK,

Petitioners,

-against-

ROCK AGAINST RACISM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

(Volume I-Pages JA 1 to JA 350)

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**Counsel of Record*

PETITION FOR CERTIORARI FILED AUGUST 5, 1988
CERTIORARI GRANTED OCTOBER 3, 1988

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United States Court of Appeals
for the Second Circuit Docket Sheet

Official Caption[1]

Docket No. 87-7417

ROCK AGAINST RACISM,
Plaintiff-Appellant,

v.

BENJAMIN R. WARD, in his official capacity as Police Commissioner of New York; GEORGE SCARPELLI, in his official capacity as Chief of Operations for Department of Parks; SHELDON HOROWITZ, in his official capacity as Special Events Director for the Department of Parks; ROBERT RUSSO, in his official capacity as Assisstant Parks Commissioner for Citywide Services, New York City Department of Parks and Recreation; JOSEPH KILLIAN, in his official capacity as Program Director for the Mall Bandshell of the Bethesda Terrace area of Central Park in the City of New York, Department of Parks and Recreation; MAYOR EDWARD KOCH, in his official capacity as the May of the City of new Yrok; and THE CITY OF NEW YORK.
Defendants-Appellees.

Authorized Abbreviated Caption[2]

Docket No. 87-7417

ROCK AGAINST RACISM v WARD

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[1] Fed. R. App.P. 12(a) and 32(a).

[2] For use on correspondence and motions only.

United States Court of Appeals
for the Second Circuit Docket Sheet

APPELLANT:

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United States Court of Appeals
for the Second Circuit Docket Sheet

DATE	FILINGS – PROCEEDINGS
5-19-87	Copy of district court entries and notice of appeal on behalf of the appellant ROCK AGAINST RACISM filed (fee paid per S.D.N.Y.)
5-21-87	Appellant ROCKA AGAINST RACISM Form C filed (w/pfs)
5-21-87	Appellant ROCK AGAINST RACISM Form D filed
6-3-87	Scheduling order #1 filed
6-16-87	Stipulation re: withdrawal of appeal received.
6-16-87	Order withdrawing appeal without costs and without attorney's fees and without prejudice subject to reinstatement by written notice to the Clerk by Sept 25, 1987 filed.
6-18-87	Certified copy of order withdrawing appeal issued.
9-14-87	Notice of Reinstatement pursuant to the Order of June 18, 1987 filed.
9-16-87	Certified Copy of Notice of Reinstatement issued to the District Court (SDNY).
11-10-87	Record on Appeal filed (Orig. papers of D.C.).
11-17-87	Appellant ROCK AGAINST RACISM brief, received.
11-17-87	Appellant ROCK AGAINST RACISM appendix (2 vols), received (waiting for DC Docket entires, cert. of service, etc.).
11-19-87	1st supplemental recod on appeal filed.
12-2-87	Scheduling order #2 field.
12-3-87	Appellees BENJAMIN WARD, ET AL. brief, received (waiting for appelant's brief ot be filed).

United States Court of Appeals
for the Second Circuit Docket Sheet

DATE	FILINGS – PROCEEDINGS
12-16-87	Appellant ROCK AGAINST RACISM brief, filed. w/pfs.
12-16-87	Appellant ROCK AGAINST RACISM appendix, filed. w/pfs. (2 vols.)
12-16-87	Appellees BENJAMIN WARD, ET AL. brief, filed w/pfs.
12-23-87	Appellant ROCK AGAINST RACISM reply brief, received (waiting for grey covers).
1-5-87	Appellant ROCK AGAINST RACISM reply brief, filed. w/pfs.
2-8-88	Appellant Rock Against Racism motion for extension or alternate date filed
2-10-88	Order denying appellant Rock Against Racism motion for extension or alternate date filed (endorsed on motion filed 2/8/88)
2-25-88	Case submitted before Feinberg, C.H.J., Pratt, C.JJ., Dorsey. D.J.
6-2-88	Judgment affirmed, reversed and remanded by published signed opinion filed, PCD,
6-2-88	Judgment filed
6-10-88	Appellees: BENJAMIN WARD, et al motion for stay of the court's mandate filed (w/pfs)
6-24-88	Order denying appellee WARD motion for stay of mandate, FILED. (WF, CH.J., GCP, C.J., DORSEY, D.J.)
6-24-88	Appellant ROCK AGAINST RACISM motion for enlargement of time filed (w/pfs)
6-27-88	Mandate (judgment and opinion) ISSUED.

United States Court of Appeals
for the Second Circuit Docket Sheet

DATE	FILINGS – PROCEEDINGS
6-28-88	Appellant Rock Against Racism memorandum in opposition to appellee motion for stay *received*
6-29-88	Order denying appellant ROCK AGAINST RACISM motion for extension of time, in light of order filed 6/24/88 denying motion for stay of mandate, FILED.
8-16-88	Notice of filing of petition for writ of certiorari filed (88-226)

United States District Court Docket Sheet

ROCK AGAINST RACISM

Plaintiffs,

v.

WARD, HON. BENJAMIN R., in his official capacity as Police Commissioner for the City of New York

SCARPELLI, GEORGE, in his official capacity as Chief of Operations for the Department of Parks

HOROWITZ, SHELDON, in his official capacity as Special Events Director for the Department of Parks

RUSSO, ROBERT
KILLIAN, JOSEPH
MAYOR ED KOCH
THE CITY OF NEW YORK

Defendants.

Amended Complt
11-5-86

Purs. to 28 U.S.C. 1331, 1332, 1341, 1651 and 2210;
1st & 14th Amndmts. of U.S. Const.

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By: Jonathan Pines
Assistant Corporation Counsel
Attorney For
Defendants.

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
4-18-85	1	Fld. Complaint; Issd. Summons & Notice purs. to 28 U.S.C. 636(c).
4-18-85	2	Fld. Pltff's Order to Show Cause why a Preliminary Injunction should not issue purs. to rule 65, directing said deft's to permit pltff to conduct a protest & demonstration concert at the 72nd St. Bandshell on 5/5/85, Ret; 4-25-85..Haight.
4-24-85	3	Fld. Pltff's atty Notice of Appearance MBG
5-2-85	4	Fld. Deft's Affdvt of Robert Russo, in opposition to pltff's request for injunctive relief.
5-2-85	5	Fld. Deft's Affdvt of Lieutenant Joseph McNulty, in opposition to pltff's request for injunctive relief.
5-2-85	6	Fld. Deft's memorandum in opposition to pltff's request for injunctive relief.
5-2-85	7	Filed stip & Order of Partial Settlement, the dept. agrees to issue to Rock Against Racism a permit to use the Bandshell area for the purpose stated above on 5-5-85, etc. Pur. to Article II, §3(d) of the Parks Rules & Regulations Rocks Against Racism will be required to post an undertaking in the amt. of $1,000., no later than 5-2-85 etc. as so indicated. So ordered Haight, J.
6-14-85	8	Fld. defts' ANSWER to the cmplt. cc
7-17-85	9	Fld. Order following initial pre-trial conference held on 7-12-85. . . that the action be placed on the Suspense docket of this court with leave to either party to apply on 5 days notice for its restoration, etc. . Haight, J. cmc
9-4-85	10	Filed transcript of record of proceedings 4-26-85

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
4-23-86	11	Fld. Pltff's Motion for a Temporary Restraining Order/Preliminary Injunction against the deft from interfering with a scheduled concert.
4-29-86	12	Fld. Defts MEMO OF LAW in opp to pltffs motion for inj relief
4-29-86	13	Filed ORDER defts memo in opp to pltffs motion for TRO & prelim inj serv & filed by hand by 4/29, pltffs reply by 4/30, oral argument on 5/1 . . . Haight, J. cm
5-2-86	14	Filed Defts AFFDVT of J. Killian in opp to pltffs motion for inj relief
5-2-86	15	Filed MEMO OPINION & ORDER# 59257, RAR can use its own sound system, I decline to releive RAR of the liability insurance req. all other charges apply exp sound sysytem; permit will extend to 7pm if RAR so req . . . . Haight, J. cmc
5-19-86	16	Filed defts NOTICE OF APPEAL to USCA 2nd Cir from USDC order of 5/2
6-3-86	17	Filed a true copy of NOTICE OF MOTION from USCA 2nd Cir;; the motion for exp appeal is denied. Record on appeal shall be filed by 6/11; appellants brief & joint appendix by 6/23; appellees brief by 7/14; week of argument as early as 8/11 . . . CLERK, USCA
6-10-86	18	Filed NOTICE that orig record on appeal has been transmitted to USCA 2nd Cir
10-22-86	19	Fld. Order following pre Trial conference. Pre Trial Conference hel on 10-22-86, Pre trial discovery shall be completed by 12-22-86, that all parties must join all amendments to pleadings by

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
		11-24-86, that all non discovery motions which do not concern amendment of pleadings of parties must be filed by 1-22-87. . . Haight. J.
10-22-86	20	Fld. Order Following Pre Trial Conference, Ordered that ptlff shall serve & file an amended complt by 11-5-86 . . . . Haight, J.
10-24-86	21	Fld. ORDER that the clerk of the court is directed to restore this case to the courts active docket . . . . So Ordered, Haight, J. cm
11-5-86	22	Fld. AMENDED COMPLT.
11-10-86	23	Fld. ORDER Allowing substitution of Counsel, Ordered that application is granted & that Noah Kinigstein shall enter his appearance in this matter . . . Haight, J.
12-1-86	24	Fld. ANSWER to Amended Complaint by Defendant Benjamin R. Ward, George Scarpelli, Sheldon Horowitz, Robert Russo, Joseph Killian and the City of New York. FA.O.S.
12-2-86	25	Fld. ANSWER to Amended Complaint by defendant Edward Koch. F A.O.S.
3-9-87	26	Fld. Scheduling ORDER for pre trial memo, P. T. memo by 3-20-87 Haight, J. cm
4-26-87	27	Fld. ORDER of permanent injunction and judgment. Ordered that Pltffs motion for a permanent injunction and complt for declartory judgment are denied. Pltffs claims for compensatory and punitive damages are denied. The foregoing constitutes the final order and Judgemnt of this Court . . . Haight, J. cm EOD 4-21-87
4-20-87	28	Fld. MEMO OPINION & ORDER # 60857 for the following reasons that The foregoing consti-

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
		tutes the Court's findings of facts and conclusion of law. To the extent that the parties proposed findings of fact and conclusions of law are not adopted herein, they are rejected. An Order of permanent injunction and judgment conistent with this opinion is being entered concurrently . . . . Haight, J. cmc
4-23-87	29	Fld. Defts NOTICE OF MOTION for an order amending the order and judgment of this Court entered 4-16-87, RET: 4-29-87
4-23-87	30	Fld. Defts MEMO OF LAW in support of defts motion to alter and amend Judgment.
4-29-87	31	Fld. Pltffs' Affirmation in Opposition to defts' motion to alter or amend judgment. gp
4-29-87	32	Fld. Pltffs' Notice of Cross-Motion to alter or amend judgment. RET: 4-19-87.
4-29-87	33	Fld. deft's Memo of Law in Opposition to pltff's Cross-Motion to alter or amend.
4-30-87	34	Fld. Memorandum Opinion & Order . . . that the parties have filed cross-motions etc. to alter or amend this Court's Order of Permanent Injunction & Judgment dated 4/16/87. . . Accordingly, except in so far as this discussion (as previously indicated) clarifies the Court's injunction, Plaintiff's cross-motion is denied. So Ordered. HAIGHT, J. SC
5-14-87	35	Fld. NOTICE OF APPEAL from Rock against Racism to the U.S.C.A. for the Second Circuit from the part of the final order of permanent injunction and judgment Sent copies of Notice of Appeal to:

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
		PETER ZIMROTH 100 Church Street New York, NY 10007 566-8311 foward copy of appeal to U.S.C.A & District Judge. Original Appeal with 2 copies of Docket sheet to Orders & Appeals.
6-5-87	36	Filed transcript of record of proceedings, dated March 23, 24, 25, 27 30, 31-April 1, 1987
6-24-87	37	Fld TRUE COPY OF ORDER (mandate) from the U.S.C.A for the 2nd Circuit. that the appeal is withdrawn without costs and without Atty's Fees and without prejudice. . . So ordered, Elaine goldsmith, Clerk KY cm
9-21-87	38	Filed LETTER dated 9-11-87 Re: Reinstatement of the Appeal, appreciating as scheduling order so we can proceed with said appeal. by Noah Kinigistein. (TRUE LETTER) copy sent to chambers.
11-19-87	39	Filed NOTICE of 1st SUPPLEMENTAL Record of Appeal transmitted to the USCA for the Second Circuit on 11-19-87.
11-10-87	*40	Filed NOTICE OF ORIGINAL RECORD of Appeal transmitted to the USCA FOR the Second Circuit on 11-14-87.
12-10-87	41	Fld. pltf's AFFDVT. & NOTICE OF MOTION awarding fees and other expenses purs to 42 U.S.C. : 1988, Ret date 12-7-87. KB.
1-14-88	42	Fld. STIP & ORDER that the deft's time to respond to Pltf's motion for attorneys fees be adjourned to 2-9-88. So Ordered Haight, J. cmc KB.

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
2-11-88	43	Fld. MEMORANDUM OF LAW in Opposition to Pltf's Motion for Attorney,s Fees. KB.
2-29-88	44	Fld. AFFIDAVIT of Noah A. Kinigstein. KB.
2-29-88	45	Fld MEMORANDUM OF LAW in Opposition to Deft's Memorandum in Opposition to his motion for attorney's fees. KB.
*2-23-88	46	Fld. MEMO ENDORSED on letter. Noah A. Kinigstein dated 2-11-88. Requesting to adjourn the submission date for the motion until 2-26-88. So Ordered Haight, J cmc KB.
6-30-88	47	Fld. MEMORANDUM OPINION & ORDER # 62788. Counsel for defts are directed to settle a modified order of permanent injunction, consistent with the Court of Appeals opinion on five days notice. Pltf is directed to file & serve written submissions in respect of the services of both its attys by 8-31-88. If pltf's application for atty's fees is resisted defts are directed to file opposing papers within thirty days of the date of service of pltf's papers Pltf may file reply papers within 14 days. So Ordered Haight, J. cmc KB.
6-30-88	48	Fld. True Copy of USCA MANDATE. It is Ordered that the order of the District Court is affirmed in part, reversed in part & remanded to the district court for further proceedings in accordance with the opinion of this court. EOD 7-12-88. KB.

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
8-31-88	49	Fld. AFFIDAVIT of James Fosbinder in support of pltf's application for award of atty's fees.KB.
8-31-88	50	Fld. AFFIDAVIT of Julie Fosbiner in support of pltf's application for atty's fees. KB.
8-31-88	51	Fld. Pltf's MEMO in Support of Motion for Atty's fees. KB.

Complaint for Preliminary Injunctive Relief,
Entered April 18, 1985

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

vs.

HON. BENJAMIN R. WARD, in his official capacity as Police Commissioner for the City of New York

COMPLAINT
85 Civ.

GEORGE SCARPELLI, in his official capacity as Chief of Operations for the Department of Parks

SHELDON HOROWITZ, in his official capacity as Special Events Director for the Department of Parks

Defendants.

Plaintiff, by his undersigned attorney, complaining of defendants, alleges as follows:

I. PARTIES

1. Plaintiff

a. Plaintiff ROCK AGAINST RACISM (Hereinafter RAR) is an unincorporated association organized to protest racism in the United States and around the world.

b. Plaintiff's demonstrations typically consist of political speeches and politically oriented music.

c. Every year since 1979 RAR has presented an event at the 72nd Street Bandshell located in Central Park.

d. This event has been held on the first weekend in May each year.

e. While plaintiffs vigorously promote the event large numbers of people typically show up without direct notification because the same event has been held on the same date at the same site for 6 years.

f. For thousands of New Yorkers the event has become a traditional spring event.

2. Defendants are employees of the City of New York who appear to have decision making powers related to this case.

II. JURISDICTION

3. This action arises under the Constitution and laws of the United States as follows:

a. The First and Fourteenth Amendments to the United States; and

b. 28 U.S.C. 1331, 1332, 1341, 1651 and 2201, and

c. 42 U.S.C. ss 1981, et seq.

III. Statement of Facts

4. On a continuing basis, plaintiff RAR has been organizing its annual event currently scheduled for May 5, 1985.

5. Plaintiff has extensively advertised the time, location and events date.

6. Plaintiff has arranged for speakers from many states and foreign countries.

7. Plaintiff expects 5-15,000 people to attend.

8. The bandshell in question is by far the most suitable site for the event and the use of any other location would cause a tremendous hardship on the organizers and the spectators expected to attend many of whom cannot possibly be notified of any change from the traditional site, time or date.

9. Plaintiffs attorney was told by defendants that the application for this site had been absolutely turned down.

10. Substitutions proposed by defendants are in no way shape or form comparable to the Central Park site.

11. Plaintiff's in the past have entered into good faith negotiatons with regard to details of time, staging etc. and have never conveyed an unwillingness to discuss details related to public safety.

12. Upon Information and belief, the reason for the defendants action is hostility towards the views of plaintiffs and a dislike for the effect their activities have upon the city's image.

IV. CAUSE OF ACTION

13. The aforementioned facts demonstrate an intention on the part of the city to deprive the plaintiffs and thousands of others of fundamental rights, privleges and immunities guaranteed to them by the First and Fourteenth Amendments to the Constitution of the United States.

V. IRREPARABLE INJURY

14. Denial of First Amendment Rights is irreparable injury.

15. Plaintiffs have no other adequate remedy at law.

VI. By reason or in consequence of the actions of defendants, plaintiff has been damaged in an amount not yet determined.

VII. REMEDIES

Wherefore plaintiff requests a judgment as follows.

A. A preliminary and permanent injunction preventing the City of New York from interfering with this annual event from now until the sun burns out or no one shows up, whichever comes first.

B. Compensatory damages in an amount as yet undetermined together with punitive damages and attorneys fees, costs and disbursements incurred in this action; and

C. Such other and further Relief as may be just and proper.

Respectfully submitted,

s/James H. Fosbinder
James H. Fosbinder
Attorney for the Plaintiff

FOSBINDER, SCHACHTER,
WALKER & WINKLER
1053 Williamson Street,
Madison, Wisconsin 53703

Answer by Defendants Ward, Scarpelli and Horowitz, Entered June 14, 1985

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

- against -

HON. BENJAMIN R. WARD, in his official capacity as Police Commissioner for the City of New York, GEORGE SCARPELLI, in his official capacity as Chief of Operations for the Department of Parks, and SHELDON HOROWITZ, in his official capacity as Special Events Director for the Department of Parks,

Defendants.

ANSWER
85 Civ. 3000 (CSH)

Defendants HONORABLE BENJAMIN R. WARD in his official capacity as Police Commissioner for the City of New York, GEORGE SCARPELLI, in his official capacity as Chief of Operations for the Department of Parks, and SHELDON HOROWITZ, in his official capacity as Special Events Director for the Department of Parks, by their attorney FREDERICK A. O. SCHWARZ, JR., Corporation Counsel of the City of New York, as and for their answer to the complaint respectfully allege as follows:

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "1" of the complaint, except admit that the plaintiff has applied for a City of New York Parks Department permit to present an event at the 72nd Street Bandshell area located in Central Park on the first weekend in May, for each year since 1979.

Answer by Defendants Ward, Scarpelli and Horowitz

2. Admit the allegations set forth in paragraph "2" of the complaint.

3. Deny each and every allegation set forth in paragraph "3" of the complaint, except admit that jurisdiction is asserted by the plaintiff to be conferred upon this Court by the Constitution of the United States and the statutory sections cited in paragraph "3".

4. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs "4" through "7" of the complaint.

5. Deny each and every allegation set forth in paragraphs "8" through "15" of the complaint.

AS AND FOR A FIRST SEPARATE AND COMPLETE DEFENSE:

---

6. The complaint fails to state a claim upon which relief may be granted.

AS AND FOR A SECOND SEPARATE AND COMPLETE DEFENSE:

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7. The defendants have not violated any rights, privileges or immunities secured to the plaintiff and have acted in accordance with the United States Constitution and federal laws and all other applicable rules, regulations, and procedures.

AS AND FOR A THIRD SEPARATE AND COMPLETE DEFENSE:

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8. In the performance of the acts complained of, defendants performed official functions and duties in good faith and in accordance with the provisions of the United States Constitution and all other applicable laws and statutes.

Answer by Defendants Ward, Scarpelli and Horowitz

AS AND FOR A FOURTH SEPARATE AND COMPLETE DEFENSE:

9. Defendants have no official policy, custom, statute, or regulation which permits or promotes the violation of any person's civil rights, nor were the defendants actions or actions based upon any indifference to plaintiff's constitutional rights, or hostility towards the views of the plaintiffs.

Dated: New York, New York
June 14, 1985

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel of the
City of New York
Attorney for Defendants
100 Church Street, Rm. 6-C-39
New York, New York 10007
(212) 566-0745

By: s/ Chad A. Vignola
CHAD A. VIGNOLA
Assistant Corporation Counsel

Plaintiff's Motion for A Temporary Restraining Order/Preliminary Injunction, Entered April 23, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,
Plaintiff,

v.

HON. BENJAMIN R. WARD, *et al.*,
Defendants.

No. 85 Civ. 3000 (CSH)

MOTION FOR A TEMPORARY RESTRAINING ORDER / PRELIMINARY INJUNCTION

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, plaintiffs move this court to enter a Temporary Restraining Order/Preliminary Injunction against the defendants, forbidding them from interfering with the annual Rock Against Racism concert scheduled for May 4th, 1986.

The basis for this Motion are fully set out in the Complaint, Declarations, Motion for a Temporary Restraining Order, and other material submitted in this case.

s/ James H. Fosbinder
JAMES H. FOSBINDER
Fosbinder & Walker
1053 Williamson Street
Madison, WI 53703
(608) 257-5517

s/Peter J. Avenia
GOMBINER & AVENIA
177 Prince Street
New York, NY 10012
(212) 677-1006
(Local Counsel)

Affidavit of Joseph Killian Read in Opposition to Plaintiff's Motion for Injunctive Relief, Entered May 2, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

- against -

HON. BENJAMIN R. WARD, in his official capacity as Police Commissioner for the City of New York, et al.,

Defendants.

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF
85 Civ. 3000 (CSH)

STATE OF NEW YORK }
COUNTY OF NEW YORK } :SS

JOSEPH KILLIAN, being duly sworn, deposes and says:

1. I am Program Director for the Mall/Bandshell/Bethesda Terrace area of Central Park in the City of New York Department of Parks and Recreation ("Program Director"). In this capacity I recently drafted and revised the "USE GUIDELINES FOR THE NAUMBERG BANDSHELL IN CENTRAL PARK" ("Use Guidelines") that are being challenged herein by plaintiff Rock Against Racism ("RAR"). As such, I am fully familiar with the facts and circumstances set forth in this affidavit, which is submitted in opposition to plaintiff's request for injunctive relief.

2. I assumed the position of Program Director on January 27, 1986. Prior to assuming this position I performed around the

country for several years as a clown and mime. I also managed my own company which provided independent consulting services in the area of special events' production. This consulting work consisted primarily of program planning, technical and logistical support analysis, and calendar and tour arrangements. My consulting clients included several municipal recreation departments such as those in Cherry Hill, New Jersey; Nashville, Tennessee; and New Orleans, Louisiana; as well as corporations such as IBM, Harris Corporation, and Sea Pines Plantation in Hilton Head, North Carolina. I also developed a program entitled "City Celebration", for the City of Grand Rapids, Michigan, a similar program to my current mission, though on a smaller scale. This program included dance, rock, jazz, kite flying, and all manner of special events' programming. While I was in Michigan, I worked in production for the Detroit rock music station WABX, which included some experience with audio technology. In addition, my special events' production work has taken me to Korea and Germany on behalf of the United States.

3. My recently assumed Program Director position with the City of New York Department of Parks and Recreation ("Parks' Department"), is my first position ever with the City of New York, in any capacity. Before February 1986, I had vaguely heard of Rock Against Racism, but I did not know what they did, nor had I ever had the opportunity to attend one of its events.

4. As Program Director I am responsible for all facets of the facilities' management of three Central Park areas: the Mall, the Bandshell, and Bethesda Terrace. My job responsibilities encompass the management, promotion, and production of all events in these three Central Park areas. I evaluate permit applications for the areas, planning and scheduling events, as well as actively seek additional programs, events, and performing groups which reflect the diverse ethnic, political, and cultural interests of Park users. As Program Director, I work with the Central Park Assistant Administrator for Design to assure that final restora-

tion and construction plans reflect programmatic and visitor need; I issue permits for performing groups and other group users of the areas, and often attend the events; I work with the Revenue Division and the Assistant Administrator for Visitor Services, reviewing concession requests-for-proposals, and monitor concessionaire practices and performance. In conjunction with the Deputy Administrator of Central Park and the Director of Urban Park Services, I ensure that all programs and events are developed consonant with existing operational support structures, and I function with the Parks' Department Press Office and the Publicity Director for the Central Park Administrator on evaluating and implementing program publicity needs. In addition, and of particular relevance here, I researched, drafted, revised, and implemented the Use Guidelines challenged by RAR.

5. Central Park receives more than 13,000,000 visitors annually. The Bandshell area near 72nd Street and Fifth Avenue within Central Park is the most frequently used park facility in New York City, with the greatest proportion of events attracting large crowds. Approximately 1100 event permits are issued each year for Manhattan parks, with about 330 in Central Park. Of the 330 in Central Park, seventy-five to ninety are granted specifically for the Bandshell, and another eighty to ninety require use of the Bandshell. (For example, this past weekends' March of Dimes Walkathon required registration of the 25,000 participants at the Bandshell area). Thus, approximately half of the Central Park event permits involve use of the Bandshell.

6. I am the first Program Director for the Mall/Bandshell/Bethesda Terrace, the position having just recently been created. At the time of my hiring, I was told that the new position had been created to centralize the fragmented responsibility for the Bandshell, and in recognition of the Bandshell's unique function as the busiest New York City park facility. Previously, many Bandshell applicants complained that they faced a bureaucratic maze of several City agencies and a host of sub-unit departments

and divisions with control over one aspect or another of the application process. Vehicle permits, special event permits, and sound permits each had to be procured from a different office. The Parks' Department's Maintenance and Operations Division, the Special Events Director, Urban Park Services, the Central Park Administrator, and the New York City Police Department all had to be contacted.

7. An adjunct to this fragmented structure was the lack of a single source of rules governing the Bandshell's use. Some rules were uncodified, having been built on years of practice, and different interpretations were possible. Without possession of any set of rules, much less one set of rules specifically applicable to the Bandshell, moreover, applicants had even greater difficulty expeditiously negotiating the bureaucratic obstacles inherent in such dispersed authority.

8. Creation of my position, thus, was intended to address these applicant complaints, and to maximize the public's enjoyable use of the Bandshell. The Bandshell was refurbished recently, and it was hoped that I could provide additional programming to enhance the use of this exceptional facility. Groups seeking use of the Bandshell now need only find one office: mine. The previously diffuse responsibilities have been consigned solely to the Program Director for coordination and implementation. In addition, my initial and primary responsibility when I commenced employment with the City at the beginning of this year, was to develop a uniform set of guidelines to be applied consistently to *all* applicants for the Bandshell area. The regulations were both to inform prospective applicants of the varied potential of the Bandshell, and to specify what was expected of them as users of the Bandshell. The Use Guidelines that plaintiff assails are the culmination of my efforts.

9. A number of steps were taken in the formulation of the Use Guidelines. Having been intimately involved in special events programming and production, including the development

of a similar program in Grand Rapids, Michigan, I knew what general framework would be needed. To develop specific guidelines appropriate for the Bandshell facility, however, it was important for me to familiarize myself with the particular characteristics, requirements, strengths, and disadvantages of the Bandshell, as well as its organizational place in the Parks' Department.

10. I first acquainted myself with the departments having primary responsibility over the Bandshell: the Central Park Administrator, the Parks' Department Manhattan Borough Commissioner, and the Office of the Commissioner. Accordingly, I arranged preliminary interviews with key individuals in each of these offices.

11. In late January and early February 1986 I met with Marie Ruby, the Assistant Administrator for Visitor Services; Elizabeth Barlow Rogers, the Central Park Administrator; Robert Russo, Deputy Commissioner for Operations; Ron Cianciulli, Central Park Chief of Operations, and Sheldon Horowitz, the Special Events Permit Director in the Manhattan Borough Commissioner's Office. I also contacted the former Assistant Director of Special Events, Michelle Shebanie. Although these individuals had broad, general suggestions of areas which should be covered by the regulations, few had any actual experience in the production of events at a facility such as the Bandshell.

12. After these preliminary interviews, I reviewed the follow-up reports by the Maintenance and Operations' crew, of every 1985 event at the Bandshell. This involved review of approximately 100 applications. I also examined about ten to fifteen more detailed reports on events held at the Bandshell, which had generated complaints either by the applicants or by the Department. In addition, I reviewed several studies of general Central Park use, and personally made physical evaluations of the Bandshell and surrounding areas.

13. Based on my knowledge of special events' production, my observations of the specific physical capabilities of the Bandshell area of Central Park, the various descriptive reports of 1985 events and park studies, and based upon my initial discussions with various Parks' Department officials, I crafted the first draft of the Use Guidelines. This first draft was reviewed by my direct supervisor, Marie Ruby, the Assistant Administrator for Visitor Services. Thereafter, I had numerous individual and group discussions with Department officials concerning ideas for revision of the specific language of the guidelines.

14. The proposed regulations thereafter were circulated among, *inter alia*, Lt. Joseph McNulty of the New York City Police Department, Central Park precinct; William Dalton, Chief of Urban Park Services, and Bill Castro, Chief of Recreation. I also contacted Burl Hash, Director of "Celebrate Brooklyn", who is in charge of the Prospect Park Bandshell, and Elizabeth Reese who is familiar with the Prospect Park picnic house. I attended several group meetings including one in February with Manhattan Borough Commissioner Patrick Pomposello, George Scarpelli, Chief of Operations for all Manhattan parks, Marie Ruby, Ron Cianciulli, and Sheldon Horowitz. I met with the Commissioner's staff, and held another meeting attended by Robert Russo, Bill Castro, Kate Pearson, the Manhattan Director of Special Events, and Marie Ruby. Based upon the many comments received, I made revisions of the Use Guidelines.

15. During the course of these discussions, I received many inquiries from applicants seeking information concerning the status of their applications for use of the Bandshell. One inquiry that I received, a letter dated February 24, 1986, was sent by Christy Robb of RAR. A copy of this letter is annexed hereto as Exhibit "1". RAR's application had been submitted by its attorney James Fosbinder, and I contacted the telephone number listed, leaving a message on the answering machine.

16. I also telephoned Ms. Robb at the telephone number listed on her February 24th letter, and I explained to her that I was creating new specific guidelines for the Bandshell. As she partially recounted in her affidavit in support of plaintiff's motion for injunctive relief, I stated that the new guidelines had been drafted but as yet had not been reviewed or approved by Commissioner Stern. I also stated that I hoped to respond to all applicants within two weeks, and that RAR's application for use of the Bandshell on May 4, 1986, would be honored. (Indeed, it has been; subject to the provision of additional information concerning the technical sound system requirements of RAR's concert, the Bandshell is currently reserved for RAR on that date.) Ms. Robb states in her affidavit that I was "extremely vague" about the new regulations. However, given the ongoing nature of drafting and revising the regulations, which were then subject to Commissioner Stern's review and approval, I could not be more specific. At the time, even I could not be certain what the precise substance and detail of the final regulations would be. I was hopeful, moreover, that I shortly would be able to distribute the Use Guidelines in final form.

17. In formulating these guidelines, the decision to provide a sound system for the Bandshell was based on two interrelated reasons. Sound amplification at the Bandshell can conflict with the enjoyment of the park by other park users, as well as disturb residents in nearby, park-adjacent, buildings. The principal introduction to Central Park as designed by Frederick Law Olmsted in the mid 1800's begins at the open-mouthed entrance at Fifth and 59th Streets. Olmsted designed the circulation route to then lead into the Park to the Mall area or promenade. This promenade which funnels Park visitors into the Bandshell area, is lined by one of the oldest stands of elm trees on the east coast. Benches run the length of the promenade beneth the canopy of tree limbs, forming an extraordinary location for peaceful strolling and relaxation. The route then takes one past the Bandshell,

through Bethesda Terrace, and into the purposely wild and chaotic Rambles. Thus, the visitor is gradually carried from urban asphalt to nature thick with trees, rocks, and vegetation.

18. The Parks' Department, therefore, has a significant interest in attempting to preserve the scarce park resources for as many equally deserving city dwellers as possible. The fact that every municipality in the United States regulates sound levels in public areas demonstrates substantial—and constitutional—interest supporting sound regulations. In addition, the Parks' Department determined that many of the complaints concerning unreasonable sound levels at the Bandshell were avoidable, if proper amplification techniques had been used. To appreciate both of these interrelated justifications, of excessive noise and improper amplification, it is important to understand the character of the areas in and near the Bandshell.

19. In my initial research described above, I explored general Central Park usage patterns, reviewing the Central Park User Survey and the vast "Rebuilding Central Park: A Management and Restoration Plan." Another report that I reviewed was an independent study by the Sociology Department of the Graduate Center, City University of New York, titled "New Yorkers and Central Park: A Report to the Central Park Conservancy". A copy of the relevant portion of this report is annexed hereto as Exhibit "2". The study concluded, *inter alia*, that "[t]he large majority of visitors come to Central Park to relax (see Table 6)." Exhibit "2" at 32. The study estimated that passive recreation accounted for over 80% of park use, with simple "relaxation" alone reaching nearly 60% of total park use. Furthermore, only 200 to 300 yards from the Bandshell is the Central Park area known as "Sheep Meadow". Sheep Meadow was designated a quiet zone, along with several other areas throughout the City, by mayoral decree, on July 25, 1985, by Mayor Edward I. Koch. The Dairy, only a few hundred yards further southwest, also fre-

quently has smaller events taking place at the same time that the Bandshell area is in use.

20. For example, on Sunday, May 4, 1986, RAR's requested event date, there will be 25,000 participants in the Cerebral Palsy Bike-a-thon, groups attending an Irish Music performance at Belvedere Castle near 79th Street, a ranger-led artists' outing, and several other events. Throughout the year, at least 160 events are scheduled at the Bandshell: Several groups have suggested that the Parks' Department grant exceptions to the sound level regulations as they are only one-day events. Yet, because amplified events occur on average more than once every other day in the spring and summer, the cumulative daily impact would be to overwhelm unnecessarily and unfairly other constitutionally-protected park users and nearby residents.

21. My investigation of the sound level issue also revealed that sound levels often are higher than necessary simply because the group using the Bandshell did not know how to amplify properly. Proper amplification of sound outdoors is difficult generally and virtually impossible on a "one-time" basis for groups unfamiliar with sound mixing outdoors and the particular bounce patterns and air currents of an area such as the Bandshell. To overcome such complexities and to reach all persons attending an event, groups often merely increased the sound volume. In addition, groups occasionally also have used inadequate equipment for the amplification levels required, and crowds unhappy with the poor sound became disappointed or unruly.

22. To address these twin concerns of excessive sound levels and poor amplification, and to accommodate the interests of park users, nearby residents, and those attending the performance, the Parks' Department decided to contract professional sound technicians—private *outside* vendors—to devise and provide sound system amplification. Several bids were received and currently

are under evaluation by the Department, which anticipates that it may use more than one vendor.

23. During the course of the formulation of the sound system regulation, I spoke to Robert Bennin, Director of Noise Abatement in the New York City Department of Environmental Protection ("DEP"), and Sheldon Wilpon, the Assistant Director. As originally crafted, the Use Guidelines were to set a particular decibel level that could not be exceeded. In my discussions with DEP, however, they indicated to me that the possible variation in actual sound impact of particular decibel readings, might be too great to justify selection of a single decibel level. Differences in air currents, temperature, the time of year, the background ambient sound level, the number of people in the surrounding park area, the nature and location of other events occurring in the park at the same time, the degree of foliage in blossom, and other factors, all apparently could change the perceived "appropriate" level of sound, from event to event. DEP also indicated that budgetary and manpower considerations permitting, they would be measuring and evaluating sound levels in Central Park this summer. Thus, subsequent studies would better inform the decision whether to set a specific permissible decibel level for Bandshell events. Accordingly, I deleted such a numerical standard in the Use Guidelines.

24. During February and early March, 1986, I spoke several times to Sidney M. Nowell, the General Counsel of the Parks Department, who reviewed the Use Guidelines, and made several minor suggestions. Subsequently, the guidelines were submitted to the Commissioner of the Parks Department, Henry Stern, who after a few word changes, approved the Use Guidelines on Friday, March 21, 1986.

25. Given that it was already late March, the following Monday, March 24, 1986, I personally telephoned all applicants seeking use of the Bandshell in April and May, notifying them of the recent issuance of the guidelines. RAR was one such applicant

that I called, and again, I left a message on Mr. Fosbinder's answering machine. Immediately thereafter, I mailed copies of the Use Guidelines to all applicants including RAR.

26. I also telephoned Ms. Robb and described the new regulations to her. When she became upset, I suggested that we set up a meeting with the Chief of Operations, and personnel from Urban Park Services, and Special Events, to attempt to allay any fears or problems that she might have. In fact, I schedule meetings with all groups that have substantial Bandshell events, to work out the details of event execution. Ms. Robb declined my offer of scheduling a meeting, however, stating that I would have to speak to RAR's lawyer. Therefore, I again telephoned Mr. Fosbinder, leaving additional messages. Ms. Robb's affidavit is inaccurate to the extent that she states that she received a "new permit application." Apparently, she refers to receiving the Use Guidelines.[1]

27. Mr. Fosbinder's recounting of our subsequent conversation in his "certification" is inaccurate. The first questions Mr. Fosbinder asked me were whether I had ever read the Constitution; whether I had showed the Use Guidelines to anyone who had read the Constitution, and whether I had showed them to a lawyer. He brusquely refused to attend any meeting to resolve the practical issues of planning the RAR concert/rally. Mr. Fosbinder's statement that RAR received a new "permit application" is untrue. Again, no new "permit application" was sent to RAR. *See* note 1, *supra*. Plaintiff's counsel claims that I stated that the Commissioner had reviewed RAR's permit application. Com-

[1] Along with the Use Guidelines I did request that groups provide me with the technical information concerning what equipment needs they would have. Applicants also had to resubmit some of their original application information for identification purposes; but the only new information was sought the names of the individuals responsible for clean up. Copies of both these blank forms are annexed hereto as Exhibit "3". Because Ms. Robb's affidavit refers to the Parks' Departments' provision of a sound system, I assume that she refers to the Use Guidelines.

misioner Stern does not review permit applications. I told Mr. Fosbinder that Commissioner Stern had reviewed and approved the *Use Guidelines*, which apply to *all* applicants, and that Commissioner Stern happened to be an attorney. I also suggested that any legal questions should be addressed to the Parks' Department General Counsel, Sidney Nowell.

28. Plaintiff therafter moved for a preliminary injunction. In plaintiff's papers seeking a preliminary injunction, they challenge principally four aspects of the regulations: (1) the provision of sound equipment through the Parks' Department; (2) the restrictions on length of the performance and set-up; (3) the required posting of a clean-up bond; and (4) the ban on sponsor-distributed literature.

29. As I previously described, the sound system guideline is a response to the twofold problem of unreasonable sound levels and improper amplification of the Bandshell. RAR's assertion that this guideline, which applies to all groups, is a response to their application, one of hundreds, is solipsistic. Moreover, it is actually a private vendor contracted by the City, and not the Park's Department itself, that will be providing the sound system. This will be a professionally managed system, with state of the art equipment, and two technicians. The Parks' Department is currently evaluating four separate bids by sound companies with extensive outdoor sound experience. The bids were solicited and evaluated by a consultant hired by the Parks' Department, Gary Floyd. Mr. Floyd is a professional sound consultant employed by the State University of New York at Stony Brook. He has been a sound consultant for many theatres, music festivals, and institutions, including staff person for the Smithsonian in Washington, D.C. Copies of the portions of the bids under evaluation, reflecting the types of equipment that they will have available are annexed hereto as Exhibits "4" through "7". The company names have been redacted as no final decision has been reached. Thus, RAR will have ample channels for expression of constitutionally

protected speech. In fact, the professionally managed sound probably will enhance the RAR concert/rally.

30. The guideline concerning curtailment of performance hours was necessitated by several factors. Preliminarily, I note that though plaintiff's motion papers request access time of 6:00 a.m. to 10:00 p.m., their original application requested 4:00 a.m. to 4:00 a.m., or twenty-four hours. A copy of RAR's partially completed application is annexed hereto as Exhibit "8". I also should note that the San Juan Fiesta, which also will be using the Bandshell for a similar program of music and speeches on June 22, 1986, only has park access from 7:00 a.m. to 7:00 p.m.. Their event draws approximately 40,000 spectators, or twenty times the peak number of 2000 drawn at the RAR concert.

31. The general ban of amplified sound before 12:00 noon is in deference to early morning park users and local residents. Studies demonstrate that most early moring park users enter the park in search of quiet enjoyment, relaxation, and nature appreciation. Complaints from nearby residents are augmented tremendously by early hour and late hour amplification of sound. Given the lengthy period of amplification to be granted RAR—six hours in the heart of the day—it is not unreasonable to curtail RAR's amplification of sound further. In addition, RAR will have pre-event access to the park for two hours before noon, and it has two hours for post-event clean up and dismantling, for a total of ten hours of park use.

32. After 6:00 p.m., moreover, new and smaller work crews commence shifts in the park. Clean-up is less efficient in diminishing light and more costly. The Bandshell has no theatrical lighting. Crucially, safety for people entering and exiting the park is much more difficult to assure.

33. Plaintiff conclusorily asserts that defendants' Use Guidelines exhibit a clear cultural bias. *See* RAR's Memorandum of Law at 5. This is a specious claim. A clear priority of my position is to ensure that events scheduled at the Bandshell reflect

the wonderfully variegated cultural, ethnic, spiritual, and political spectrum represented in the City of New York. I have recently scheduled diverse music from a number of rock groups to hispanic music, latin salsa, southern jazz, modern dance groups, ballet, opera, children's theatre, and more. RAR proffers no facts in support of this putative Departmental animus against rock music. RAR's unsupported and unsupportable contrary charge is frivolous and irresponsible.

34. RAR also complains about the imposition of a clean-up bond. Few matters are more vital to the Parks' Department than seeking to maintain the few pristine oases of nature and beauty existing in the City's urban environment. Recently, millions of dollars have been spent attempting to replenish, refurbish, and rejuvenate the beauty of a park which was once one of the world's preeminent. Any time that any large group of individuals seeks to use any portion of the park, including the Bandshell, they are required to post a clean-up bond. RAR is subject to no disparate treatment. This requirement applies to all organized activities involving significant numbers of participants. For example, the March of Dimes Walkathon, a park event yesterday requiring sign-ups at the Bandshell, had to post a $10,000.00 bond last year. Because the money is returned after adequate cleanup, it is difficult to understand RAR's objection to the bond requirement. Indeed, RAR's $1,000.00 in bond money was remitted in full last year.

35. Costs of clean up, moreover, are not insignificant. For example, San Juan Fiesta recently accepted the City's bid—on information and belief, the low bid—for clean-up work after their event. The bid was $6,700.00. Plaintiff argues that because the City does not require "bicyclists, roller skaters, joggers or frisbee players" to insure themselves or to provide a clean-up bond, it is unfair to require the same of RAR. Any event of more than twenty-five participants requires the posting of a clean-up bond. Plaintiff's "roller skaters" argument is patently frivolous and re-

quires no further comment.[2] Having been involved in special events' production for years and in areas all over the country, I can confidently state that a cost of $800.00 to $1,200.00 to produce a program such as RAR's is inexpensive. Certainly, the Parks' Department is not making a profit, and it would be difficult to provide a professional sound system at much less cost. I also should note that there are numerous other excellent and less-used bandshells and other park facilities throughout the City. These also are available for plaintiff's use, and may be even less expensive. At present, plaintiff has neither completed all portions of the original permit, *See* Exhibit "8", nor returned the supplementary request for information on the technical equipment requirements' form. Like any other applicant, plaintiff must complete these forms in order to use the Bandshell.

36. The Use Guidelines which I drafted apply to everyone. RAR is not entitled to special treatment. Nor does it seem necessary to despoil Central Park for all other park users when RAR can reasonably use the Bandshell without infringing on other citizen's rights. Reasonable accommodation can be made for RAR as I indicated from the outset of my discussions with Ms. Robb. As a former performer, as a special events' producer and frequently an avid spectator, I have every intention of ensuring that all groups are handled consistently and that the Bandshell area remains a mecca for all varieties of performers. RAR is but one non-differentiated applicant to the Parks' Department.

[2] In fact, the Police Athletic League which sponsors a "Roller Skate-A-Thon" is required to post a clean-up bond and have liability coverage.

37. Should the Court desire additional information concerning the Use Guidelines, I would be quite willing to testify further. RAR's unfounded accusations and pursuit of meritless claims debase the legitimate interests protected by the first amendment. Although I have been told that Thursday's hearing date is for legal argument alone, I will make myself available on Thursday for the Court's convenience.

s/ Joseph Killian
JOSEPH KILLIAN

Sworn to before me this
29th Day of April 1986.

s/ Norma Kerlin
NOTARY PUBLIC

Exhibit "1" Annexed to the Affidavit of Joseph Killian
Letter, Dated February 24, 1986, From Rock Against
Racism to Joseph Killian

ROCK AGAINST RACISM, NYC

2647 Broadway #2W
New York City, NY 10025

(212) RAR-1197
(212) 316-0426

Feb. 24, 1986

To: Mr. Sheldon Horowitz, Special Events
16 West 61 Street
New York, N.Y. 10023

Mr. Horowitz:

I am writing to you in reference to an application dated May 31, 1985 submitted to your office, in the name of Rock Against Racism by our Attourney Jim Fosbinder. As of this date we have heard nothing from your office as to the status of this permit. As a member of Rock Against Racism I am asking that your office either send the requested permit or a written explanation of why it is delayed or denied. I understand that normally the date applied for is reserved if free and then within two weeks the permit is mailed or an explanationis given for its' denial. Many months have elapsed with no word. Please give this matter your immeadiate attention. Thank you.

Sincerely,

s/ Christy Robb

Christy Robb,
for Rock Against Racism

Exhibit "2" Annexed to the Affidavit of Joseph Killian
Portions of "New Yorkers and Central Park:
A Report to the Central Park Conservancy"

NEW YORKERS and CENTRAL PARK

A REPORT TO THE CENTRAL PARK CONSERVANCY

William Kornblum
Terry Williams

Sociology Department
Graduate Center CUNY

April 1983

Residence of Park Visitors. The majority of frequent visitors live within easy walking distance of the Park. It is difficult to compare 1973 and 1982 data on this variable since the lack of interviews about 96th Street skews the 1973 data, toward the greater proportion of non-Manhattan visitors who enter the Southern Park gates. On the basis of the 1982 survey data, and assuming approximately 3,000,000 different visitors annually, it appears that Central Park receives over 500,000 annual visits by out-of-town residents making it one of the top three tourist attractions in the City (with the Statue of Liberty and the United Nations).

Activities in the Park. The standard dichotomy of "passive versus active" recreation hardly begins to describe the way people use Central Park. When visitors were asked what they did in the Park their answers required more than sixty coding categories. But the distinction between relaxing activities and those requiring strenuous exercise is particularly relevant to issues of Park restoration. Tables 6, 7, and 8 condense the wealth of data on activities in a fashion which retains some of their cultural richness.

The large majority of visitors come to Central Park to relax (see Table 6). The forms this relaxation take are enumerated in Table 7, which shows that perhaps the biggest attraction, next to the park environment itself, is the opportunity one has to watch other people in their activities. But if the majority of park visitors continue a pattern of park relaxation established in the nineteenth century, smaller but highly significant proportions come to play sports, to bike or roller skate, to hear or to play music, or to study the park's natural environment. A small proportion of visitors (although disturbingly large in absolute numbers) admitted to our interviewers that their purpose in the Park that day was connected to some form of social deviance, drug use or drug sales in particular.

That relaxation in all its forms is so important (see Table 6) counters the image of Central Park visitors largely devoted to field sports and strenuous exercise. Visitors to all quadrants of

the Park seem to have the same basic need for relaxation. But it is true that in Park areas which attract a younger constituency, particularly the Upper West Side and Harlem, large minorities of visitors come primarily for sports, biking, and playground use. Even with these differences, however, the basic finding that the majority of park visitors seek opportunities for relaxation and contemplation still holds.

If space demands for active sports were at levels found for more passive, relaxing activities, Central Park would not function nearly as well as it does. There would simply not be enough space to accomodate the demand for sports

TABLE 6

Major Activity Categories, Central Park Visitors, Summer and Fall, 1982 (in percent)

Activity	Weekday	Weekend	Total
Relaxation	54.1	59.7	57.7
Sports	9.5	8.7	9.0
Water	2.7	2.3	2.4
Nature	4.2	3.3	3.7
Wheels	6.9	7.4	7.2
Music	4.8	5.7	5.3
Commute	6.5	2.2	3.8
Zoo	5.6	4.5	4.9
Playgrounds	2.8	3.7	3.4
Drugs/Deviance	2.8	2.4	2.6
Total	100.0	100.0	100.0

Exhibit "2" Annexed to the Affidavit of Joseph Killian

Activity Type	Weekday	Weekend	Total
Active	19.2	19.8	19.6
Passive	80.8	80.2	80.4
Total	100.0	100.0	100.0
N	567	991	1558•

•Some respondents noted more than one activity.

Source: City University of New York sample for Central Park Planners, 1982.

TABLE 7

Types of Relaxation by Central Park Visitors, In Rank Order and by Weekday and Weekend, 1982

Type of Relaxation	Weekday	Weekend	Total	Rank
People Watching	22.1	26.7	25.1	1
Relaxing	21.2	19.1	20.0	2
Thinking	20.2	13.2	15.6	3
Taking in the Park	9.4	11.3	10.7	4
Reading	11.0	10.1	10.1	5
Wandering	5.9	6.1	6.1	6
Sunbathing	1.3	6.0	4.5	7
Waiting	5.0	3.4	3.9	8

Exhibit "2" Annexed to the Affidavit of Joseph Killian

Type of Relaxation	Weekday	Weekend	Total	Rank
Picnic	4.0	3.0	3.3	9
Sleeping	0.8	0.7	0.8	10
Total	100.1	100.8	99.9	

terrains. Indeed it is true that even at existing demand levels the Park can not accomodate all those who request sports facilities for softball and soccer.

Approximately 260,000 annual park visits are accounted for by softball and baseball players (the latter confined primarily to one field in the Western section of the North Meadows area). On a given weekend day during the softball season (April-October, with the heaviest use in May and June) there are approximately 2,000 soft-ball players who completely occupy all designated ball diamonds from Heckscher to the North Meadow. Central Park ball fields are reserved to capacity during the most desirable post-workday and prime weekend hours. Thus the numbers of ball players who use the Park and who thus appear as a proportion of active park users in our exit survey is not an indication of the greater demand for ball fields in the Park. Yet to dedicate more space to ball fields, were that possible, would also increase the excess capacity which exists at times other than those of peak demand. This is the problem with all seasonal activities in the Park whose peak demand exceeds design capacity. One partial solution which shall be discussed later is to attempt to alter the temporal patterns of facility use by encouraging play at off-peak hours.

SOCIAL CHARACTER OF PARK VISITS

There is a rather marked contrast between weekend and weekday Central Park visitors, as shown in Table 9. The weekday visitors tend to be solitary individuals (63.8 percent) while the

weekend visitors are more likely to be members of a family group or couple. These findings highlight the fact that weekends in the Park are more often

* * *

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* * *

TABLE 8

Activities by Park Areas,• 1980 (in percent)

Activities	South End	East 72nd	West 72nd	Upper West Side	Upper East Side	Harlem
Relax	56.0	51.0	54.0	44.0	71.0	48.0
Sports	4.0	8.0	6.0	22.0	12.0	9.0
Wheels	5.0	7.0	6.0	7.0	6.0	17.0
Nature	3.0	4.0	7.0	2.0	.5	1.0
Water	3.0	4.0	7.0	2.0	.5	1.0
Commute	5.0	5.0	4.0	1.0	3.0	1.0
Music	6.0	6.0	4.0	2.0	4.0	11.0
Drugs	4.0	1.0	3.0	2.0	2.0	1.0
Zoo	10.0	8.0	3.0	1.0	.5	3.0
Playground	2.0	6.0	2.0	10.0	.5	3.0
Pet	3.0	2.0	6.0	7.0	2.0	4.0
Total••	100.0	100.0	100.0	100.0	100.0	100.0

• Refers to gate areas where respondents were interviewed.

•• Total percentages may be slightly more or less than 100 due to rounding.

TABLE 9

Social Character of Visits to Central Park by Weekday and Weekend Visitors, 1982

Respondent was:	Weekday	Weekend
Alone	63.8	46.7
With Family	9.0	14.2
In a couple	20.0	30.1
With a group of friends	3.2	4.7
Team	0.5	0.5
Tour	0.5	0.2
Other	3.5	3.8
Total•	100.0	100.0

• Total percentages may be slightly more or less than 100 due to rounding.

Table 11 shows the ranking of areas which Park visitors say they tend to avoid, primarily for reasons of perceived safety. These percents represent first choices, in other words 20 percent of respondents said there were certain places or sections of the Park which they do avoid. These were generally located above 96th Street. While the vast

TABLE 10

Central Park Places Visited and Most Favored by All Respondents from Adjacent Neighborhoods

Favorite Places	% Selected Favorite by Manhattanites	Rank
Zoo	15.5	1
Conservatory Water	11.0	2
Reservoir	15.0	3

Exhibit "2" Annexed to the Affidavit of Joseph Killian

Favorite Places	% Visited by Adjacent by Manhattanites	Rank
Sheep Meadow	14.5	4
Boathouse and Lake	12.0	5
Great Lawn	6.0	6
North Meadow	49.0	7
Rink and Dairy	7.5	8
Bethesda Fountain	24.0	9
Heckscher	6.5	10

Places Visited	% Visited by Adjacent Manhattanites	Rank
Zoo	4.0	1
Conservatory Water	8.1	2
W. 72nd Border	2.0	3
W. 80/W. 94	8.3	3
Reservoir	5.5	4
Dairy	11.0	5
E. 66-77	21.0	6
Heckscher Fields	22.0	7
North Ball Fields	64.0	8
Sheep Meadow	9.1	9
Harlem Meer	50.0	10

majority of Park visitors do not volunteer places which they claim to avoid (over 80 percent had no places so indicated), there is a proportion of visitors shown in table 11 who say they avoid the entire Park above 96th Street. We shall see presently that some outspoken Harlem residents regard this fear as part of the "cycle of fear and neglect" which seems to them to account for the more deteriorated condition of places like the 110th Street Boathouse.

Exhibit "2" Annexed to the Affidavit of Joseph Killian

TABLE 11

Places Central Park Visitors Said They Most Avoid, 1982 (in percent)

Park Area	Rank	Percent
Above 96th	1	5
Conservatory Garden	2	3
North Meadow	—	3
Harlem Meer	—	3
The Loch	—	3
Great Hill	3	2
The Ramble	4	1

In summary, the human ecology of Central Park is established by activities which park visitors engage in, as well as by their perceptions of which is appropriate behavior in given Park places. These activites and perceptions are naturally shaped by pre-designed facilities and by official actions, but very often the steps taken by Park administrators are responses to conditions created by the public in specific areas of the Park. The influences are always reciprocal. Over many seasons and generations of park use there emerges a moral order within the Park, a public consciousness about how the Park is faring in terms of its ability to satisfactorily host people with differing recreational goals, with different class and ethnic characteristics, and frequently, with different notions about what is appropriate public behavior. Much is said about increases or decreases in perceived safety in the Park, and about the public's perceptions of the quality of the Park envirionment. Indeed there is a literature now spanning well over

a century which documents the changing tides of public consciuosness about the Park. But throughout the years there has been a remarkable continuity in the ways the Park is used and percieved by the New York public. Despite the changes in these uses and perceptions, some of which have been discussed already, the important story with regard to park use is the striking amount of similarity there is between the Park's use patterns and its human ecology between the nineteenth century and the present.

BEHAVIORAL MAPS OF VISITOR USE

In order to gain an even more variagated picture of the Park's human ecology, let us look at patterns of activities and their temporal phasing on two more or less typical days, one a weekday and the other a Sunday. Both were sunny, relatively warm days—the Sunday was in the early fall and the weeday was in late August. Each was "typical" in that the weather was good and there were no extraordinary events planned that day or evening which would attract unusually large or specialized crowds of visitors. Of course it could be argued that a "typical" day in the Park, if there is one at all, is just that type of day when there is the normal heavy park use and one or more importnat events which draws thousands of additional persons. For the purpose of describing the major comings and goings and "roosting" patterns in the Park, however, it is more convenient to describe the kind of day in which there is not a mass event scheduled. Thus on the weekday and the Sunday we describe, a team of thirty or more trained observers went through every Park area at four distinct time periods: during the morning (8 to 9 A.M.), at midday (11 to 1 P.M.), the afternoon (2 to 4 P.M.), and the evening (5 to 7 P.M.). On each occasion all park users were counted, their precise location in the Park area and their activities were noted, as well as any forms of consumer behavior or conflict.

Information gatherd in these comprehensive "sweeps" of the Park are summerized in graphic form in two summary behavioral maps. These maps show the relative volume of use of the Park's

areas and highlight places in the Park where visitor use tends to be active versus those where use is more passive or restful. The maps are extemely useful summaries of overall park use; they provide the most accurate information now available on the way park users actually situate themselves in specific Park areas. Yet the summary maps require some supplemental narrative description. In particular, it is worthwhile to use the data on which they are based to describe the diurnal rhythms in park use—that is, the daily ebb and flow of Central Park's human visitors.

DIURNAL RHYTHMS IN PARK USE

Let us begin with a warm Sunday. The heaviest use days in any season are Sundays.

Sunday mornings in Central Park begin slowly. Runners, bikers, dog walkers and bird watchers converge on the Park from all directions as the sun comes up. By 8 A.M. on a warm summer Sunday there are already over a thousand active recreationists scattered around the Reservoir, the Great Lawn, the Conservatory pond, and the Sheep Meadow. The areas around the Mall, Bethesda Fountain, and the Ramble are relatively quiet, with a few scattered walkers and early morning newspaper readers here and there on the benches. Later in the day the area from the Plaza gate to the Bethesda Fountain will become the population center of the Park, with people dispersing from this hub of activity throughout the lower reaches of the Park. But in the early morning, these are quiet places.

By 7 A.M. most of the Park's summer inhabitants will have risen and begun their morning ablutions. There are no firm counts of the number of homeless people who live in the Park during the warmer months, but observers counted seven vagrants awakening in the rock formations below the Dairy, from five to fifteen vagrants who had slept in the West 59th Street area above the Heckscher ball fields, and at least twenty more indigent park dwellers or overnight visitors who had strayed into the Park after

a Saturday night binge. In all, there are usually between fifty and one hundred persons who awake in the Park after having slept there the night before. And as the population of homeless and disturbed people increases in Manhattan in general during the warm months, so this population increases in the Park as well.

The early morning is prime time for the Park's birders and nature lovers. Early birders can spot more species in the transition time from dawn to day and they also have the pleasure of peace and quiet, the relative freedom from human distractions and noise. Unlike the joggers, who puff along on the edges of the quiet lawn areas, or the early morning dog walkers whose pets usually demand hurried visits to habitual spots at the Park's edge lawns, the nature students and bird watchers browse throughout the Park and come to know all its habitats. The Ramble is their favorite haunt, but the entire Park offers possibilities for their reverential appreciations. A small proportion of regular park users, the nature lovers are, nonetheless, large in absolute numbers and a vital Park constituency. They help form the eyes and vocal chords for the Park's plant and animal life. They penetrate less well trodden Park areas and regularly report on conditions, which only the most expert Park maintenance personnel monitor.

By mid-morning (10 A.M.), the Sunday rush in to the Park is on. Thankfully for those who seek the relative repose of the park morning, the full rush will not get underway until mid-day or early afternoon. But by mid-morning all the athletic facilities in the Park will be used to capacity and will likely remain so used until much later in the afternoon. The tennis courts and softball fields will be completely occupied by 10 A. M. unless the day is so hot and so late in the summer that the competing charms of Jones Beach, Fire Island, and other more distant recreation areas will have drawn away the largest crowds. But from the days of "Spring Madness" in the first week of warm days and spring bloom, to the onset of summer's "dog days" in late summer, the Park will be used to capacity during most daylight hours.

Our behavioral maps show a good deal of passive recreation use directly adjacent to the most actively used sports facilities (the Great Lawn or the Heckscher and North Meadow Fields). As always in park use, one group's exercise or ritual is another's entertainment. Thus in addition to the normal groups of spouses and children who create spectator picnics around some games, there are groups of elderly men who frequent the bleachers at Heckscher and come to know the various teams well enough to place friendly bets on the outcome of games. This same group of retired, predominantly white park regulars often remains in the area until dusk for a spirited dice game, one of the handful which might be found in one area of the Park or another almost any day of the week.

By early afternoon the Park reaches its period of peak use. Now from 59th Street to 110th Street it is virtually impossible to comprehend the vast array of park activities and impromptu events. Families, couples, and friendship groups stream through the big gates at the Park's Southern corners and elsewhere (especially at the 72nd Street gates and the entrance at Powell Blvd.). The Mall and the internal approaches to the Zoo become a huge "no-ring" circus with clowns, jugglers, mimes, musicians, acrobatic disco skaters, vollyball players, frisbee artists and kibbutzers. Lines form by the vendors' carts. Eager children pull their parents toward the Zoo. The benches along the Mall become crowded but there always seems to be a spot from which to view the activities.

The Sheep Meadow is the Park's center for relaxation, just as the Mall, the Zoo, the Lake and the Drives are its prime strolling ways. At a given moment in the late spring or early summer there will be from 300 to 900 people reposing on the Sheep Meadow. Now that people seeking a quiet place to lie down in the sun themselves no longer fear getting trampled by a soccer or football player, Sheep Meadow has become the undisputed center for horizontal activities in the Southern half of the Park (rivalled only

by the lawns which slope toward the Conservatory Water and Model Boathouse). But no area of the Park is ever entirely peopled by sedentary users. At its most crowded the Sheep Meadow may host a number of frisbee games, a football catch game or two, and assorted kite artists.

Toward 5 P.M. the Park begins to empty rapidly. At dusk the human rhythms are once again dominated by the flow of runners, bikers, and dog walkers. Yet there will be hundreds of strolling couples and solitary walkers in most lawn areas. On especially hot evenings family and neighborhood gatherings above 96th Street may extend far into the night as people seek to escape the heat of their apartments. And in the Park's South end, especially below the Dairy and on the slopes above the Heckscher ball fields, the vagrants and homeless indigent bed down for the night.

Weekday Park rhythms contrast markedly with those of Saturday and Sunday even if there are also some important similarities. Weekday peak hours are at mid-day, when thousands of lunch hour visitors stream into the Park's lower corners and fan out along the Mall, the Lake, and the Zoo. Peak hours on the Park's sports fields are between 4 P.M. and 7 P.M. when adult leagues from Manhattan fill every available space. Pick-up games of soccer and Ultimate Frisbee crowd the outfields and lawns adjacent to the formal ball fields. And before the regular league play begins, the Park's playing fields are heavily used by children from more than thirty private schools which are with in easy walking distance.

Early morning use of the Park peaks earlier on the weekdays than it does on the weekends. Runners must find their exercise time before getting ready for work. And after the prime running and dog walking hours there are (from about 7:30 to 9 A.M.) a few thousand walking commuters who tend to come from Westside neighborhoods and who cross the Park on their way two mid-town offices.

These comparisons between weekday and weekend use can be easily overstated. Park attendance on warm summer weekdays bears real similarities to weekend days. So many New Yorkers and their families will normally be on vacation, or are not in the labor force, or not in school, that weekday park use in late spring and during the summer is quite like weekend use in many respects. The major differences are in times of peak use, as noted, and in the volume of weekday visitors who are solitary visitors (see Table 9). And of course a major difference on many weekdays is the scheduling of evening music and theatre performances which bring thousands of later afternoon visitors into the Park and create untapped possibilities for extending the temporal cycle of park use into the evening and nighttime hours.

Central Park commuters, whose numbers have been swelling with every decline in subway service on Manhattan's Westside, add their eyes and ears to the agents of park social control. But they are not park visitors in the same way that persons whose actual destination is the Park. Yet a close examination of public use patterns in some of the Park's most popular places shows that only a minority of those who are park visitors and who pass through an area actually remain there for any legnth of time.

THE MALL TO BETHESDA FOUNTAIN: FLOWS AND SCENES

More people in Cental Park will be moving toward a Park destination or strolling through the Park than will be settled. Thus at Bethesda Fountain, for example we find that only 20 percent of people who arrive there actually stop for any length of time. Once commuting hours are over, patterns of movement and settling are largely set by flows to and from the Park's major places, or by the flow of people to Park events and activities. This is the general case for most urban parks. It is also true, however, that fads in American popular culture also help shape the way people use or avoid certain areas. The explosion of divergent "lifestyles" in the 1960's has had effects in the Park which remain

today, and especially in the area of the Mall and the Bethesda Fountain.

The Mall has always been a social promenade, a place for people to see who is in the Park and to be seen in return. After strolling the Mall, people generally decide to settle on a nearby green or to continue on a Park ramble. In the 1960's, however, the norms of public conduct underwent such vast changes that places like the Mall and the Fountain became almost transformed socially.

The "baby boom" generation reached its teenage and early adult years in a period of social conflict over American foreign and domestic policy. Racial protest and urban riots made public places in the central cities more frightening to people from the outer rings of metropolitan settlement. Later in the 1960's and throughout the 1970's inflation eroded public budgets; funds to maintain parks decreased and many of the nation's major city parks became increasingly seedy and rundown. Drug use and public drinking became ever more widespread, while efforts to control minor crimes and public nuisance were frustrated by shrinking law enforcement resources and over-crowded courts. Efforts to enliven public places with "happenings" and mass public events of all kinds did help stimulate renewed public use, but they also tended to produce new patterns of turf claims in the parks.

These trends which affected the entire nation had evident and lasting effects on the Mall and Bethesda Fountain. Bethesda in the late 1960's and through the 1970's was a center for inter-racial youth gatherings. The Fountain also became an open drug market and a place to "party" well into the evening. The Mall retained its character as the Park's dominant promenade, but it also took on the rather wild aspect of a permanent rock festival.

This period of loosening public decorum has largely passed. Yet its legacy remains in many forms, some extremely positive and others much less so. There appears from our survey data and

observations throughout the Park to be much more integration by age, ethnicity, and race in the Mall area than there was before the cultural and political movements of the 1960s. Indeed the lower end of Central Park functions much more as the commons for all of Manhattan's communities than it probably ever has. But there is now a greater concentration of street performers and illegal vendors who compete for the visitors' attention and coins. This passage from the field notes of one Park researcher captures the feeling on the Mall during a typical, heavy use day (July 4, 1982):

> Leaving the fountain area I walked past the band shell to the Mall area where a number of comedians, musicians and others competed for the attention of the holiday strollers. One jazz group was composed of alto and tenor saxaphonists, guitarist, bass, drum and conga players. As they began their first tune only one or two strollers stopped to look and listen. By the time the band's soloists were well into the improvisational part of the tune, a crowd of 50 people had formed. Some time later, as the drum and conga played a section leading to the end of the first tune, the crowd numbers had trebled in size.
>
> I counted 170 people listening intently to the up tempo tune. The crowd was truly a mixture of the many New York City sub-cultures. A young white man, casually but expensively clad in a yachting outfit, carried a 5 or 6 year old girl piggy back on his shoulder as he moved his head to the music. A young black woman and a white man were holding hands as they listened. In the back of the crowd two matronly white women near me complained to one another about their inability to see the musicians because of the expanding crowd. A few feet to the right of these women a toothless and disheveled black man (about 40 or 50 years of age) clowned and danced while he tried to sell a handful of scruffy looking "loose joints" (he boasted that they were Herpes repellent).

Suddenly the song came to an end, and just as abruptly much of the crowd had disbursed. Left were 15 people who waited for the next tune. After a period of discussion the musicians began once again, and once again the ranks of the music listeners were swelled by the continuing stream of strollers coming through the area.

The observer might have added to this account a note about the cacaphony caused by loud radios and tape players, as he does in the following notes about the Fountain written on the same July 4th holiday in the Park:

The scene around Bethesda Fountain was at first something of a surprise. For whatever reason, on this holiday much of the overt drug related activity that I had observed there in past summers was less in evidence. I took a seat on the stone barrier just 12 feet east of the great stone stairs, bordering the tree shaded grassy area.

From this vantage point I had a good view of much of the activity around the fountain. Seated next to me were four Hispanic teenaged males who played a large Hitachi radio loudly.

Seating space around the fountain was dominated primarily by younger (i.e. age 17-30) people. They were in groups of as many as 5 and as few as two, with a sprinkling of individual lookers on. Unlike in past visits, there were not the large numbers of those who stand around the fountain and essentially make "happening" mystique of the fountain. On this day the numbers of those seated on the fountain's edge were relatively small. Through the cacaphony of the many radios, the groups seated around the fountain watched the crowds of people parade down into the fountain area.

The size of the crowd walking through the fountain area, though not extremely large, was certainly larger than

the groups that sat around the fountain watching the parade. On this day the throng that strolled through had a heavy representation of white middle class "square" types. Some seemed interested in the social happenings around the fountain. Other strollers were simply walking through the area toward the boat house area of the great stone stair case.

Repeated observation at Bethesda Fountain during the Summer of 1982, combined with systematic counts of foot traffic there, corroborate the more subjective notes of this observer. Bethesda Fountain is much less of a "scene" for drugs and the "youth culture" than it was during most of the 1970s. This change appears to be due for the most part to more effective police enforcement (including the actual closing of the area at times). But it must also be attributed more generally to a gradual public redefinition once again of the Fountain as a place for all to visit and enjoy.

Tables 12, 13, and 14 present numerical data on the movement of people in and out of the Fountain area. They show quite clearly that the West stairs and the paths Northeast and Southeast are by far the most frequently used Bethesda entrances and exits. A significant difference exists between weekdays and weekend days, however. Far more people move into the Fountain through the West stairs (presumably from the Mall) on a Sunday than is true for the weekdays. A matrix of movement through the Fountain (presented here with numbers in absolute form representing a typical weekend day, see Table 12) shows quite dramatically that the flow of people through the fountain goes through the main stairs in the direction of the Metropolitan Museum of Art and the Conservatory Water (or visa versa). And as mentioned earlier, only about 20 percent of all pedestrians who arrive at the Fountain actually choose to linger there on the benches.

Pedestrian counts at the Fountain also provide an interesting natural experiment on the use of the underpass entrance to the

Fountain. So few people use this entrance to the Fountain at any time that we can safely conclude that the closing of auto traffic on weekends is not a factor here. As few people use the underpass when there is auto traffic on Olmstead Way as when the road is closed. The

TABLE 12

Direction of Pedestrian Flow at Bethesda Fountain, Weekday, 1982, (In Absolute Numbers)

		Exit							
		A*	B	C	D	WS	ES	M	T
Entrance	A	11	70	7	7	145	19	6	265
	B	48	5	3	5	43	30	6	140
	C	6	1	1	0	1	2	0	11
	D	7	3	1	3	1	0	0	15
	WS	177	133	11	6	14	9	2	352
	ES	68	40	4	0	2	8	6	123
	M	32	20	0	2	1	2	3	55
	T	347	272	27	23	207	70	23	971

* A = Northeast; B = Southeast; C = Southwest; D = Northwest; WS = West Stair; ES = East Stair; M = Underpass; and T = Total.

underpass appears simply too long and forbidding to be used except by "regulars" and especially by persons involved in the Park's mobile market for soft drugs. Perhaps the best that can be said about this underpass is that it could be closed with no disruption of Park circulation and with a beneficial increase in usable service space. The quality of the Fountain's public comfort stations will likely never reach a desired state of civility without some new efforts at including cafe services there.

The Bandshell. In the vicinity of the Mall and the Fountain the most avoided places are the rear of the Bandshell and the

Rumsey Playground. One need only contrast the well used, modern playground between 5th and the East Green with the desolate emptiness of the nearby Rumsey

TABLE 13

Demographic Characteristics of People Who Came to Bethesda Fountain on Weekdays and Sundays, 1982

	Weekday (N = 790)	Sunday (N = 2050)
Sex		
Male	64.5	55.7
Female	35.4	44.3
Total	99.9	100.0
Ethnicity/Race		
Black	18.1	7.7
White	63.7	74.2
Hispanic	12.4	11.4
Other	5.8	6.7
Total	100.0	100.0
Age		
Child	10.5	7.2
Teen	16.3	11.0
Adult	72.0	81.4
Senior	1.1	0.4
Total	99.9	100.0

facility to know immediately that the latter no longer serves the population for which it was intended. In general, the more successful playgrounds are those located on the periphery of the Park rather than some of the more

Exhibit "2" Annexed to the Affidavit of Joseph Killian

TABLE 14

Pedestrian Flow Through Bethesda Fountain Walks, Both Directions, Weekday and Sunday, 1982

	Weekday (10 AM-6 PM)	Sunday (10 AM-3 PM)
Paths		
Northeast	27.8	13.5
Southeast	22.4	15.6
Southwest	1.0	1.4
Northwest	1.2	3.5
Underpass	2.3	3.5
West Stair	31.5	44.2
East Stair	13.2	18.2
Total	100.0	100.0
N	813	2142

ambitious facilities in the Park's interior. This is certainly true on the East side with reference to the Rumsey Playground. Hidden form view by the Bandshell and the Wysteria Pergola, the lack of playground use at Rumsey and its attraction as a hideout for drug deals strongly suggest that the area be re-designed. There is the possibility here for an urgently needed gain in multi-purpose lawn area which would help relieve some of the pressure on the Great Lawn.

Exhibit "3" Annexed to the Affidavit of Joseph Killian

City of New York Parks & Recreation

Bandshell Use Application Forms

CENTRAL PARK BANDSHELL
TECHNICAL REQUIREMENTS

PLEASE FILL OUT THIS FORM AND RETURN TO:

Joe Killian
Central Park Administrators Office
The Arsenal
830 Fifth Avenue
New York, N.Y. 10021

We must receive this form NO LATER THAN THREE (3) WEEKS PRIOR TO EVENT DATE(S).

For events featuring a number of different acts/bands with differing technical needs a sponsor must file separate technical forms.

ORGANIZATION _____

DATE OF EVENT _____ _____

TIMES:

SET UP FROM _____ to _____.

Actual Event from _____ to _____.

Load Out from _____ to _____.

NAME OF PERFORMING GROUP(S) _____

NUMBER OF PERFORMERS _____

NUMBER OF TECHNICIANS OR PRODUCTION PERSONNEL _____

NAME OF TECHNICAL DIRECTOR: _____

Exhibit "3" Annexed to the Affidavit of Joseph Killian

PHONE NUMBER/DAY ( )_____

PHONE NUMBER/EVENING ( )_____

ADDRESS_____

CITY_____STATE_____ZIP_____

NAME OF STAGE MANAGER:_____

PHONE/DAY_____

PHONE/EVENING_____

ADDRESS_____

CITY_____STATE_____ZIP_____

CITY_____STATE_____ZIP_____

The Central Park Bandshell does not have any lighting instruments or facilities.

The Central Park Bandshell does not have any curtains, wings, borders, scrims, or masking.

The Central Park Bandshell has a small changing area, with a small men's and women's bathrooms. These facilities are small and use must be limited to performers and stage crew.

In addition to the concrete Bandshell stage the DPR has a stage extension. This extension measures 20 x 28 feet.

THERE IS NO PLACE TO STORE OR LOCK VALUABLES IN THE BANDSHELL. PLEASE INFORM ALL PERFORMERS OF THIS. THE DEPARTMENT OF PARKS AND RECREATION AND THE CENTRAL PARK CONSERVANCY ARE NOT RESPONSIBLE FOR STOLEN OR LOST PROPERTY.

Sound Amplification Needs:

_____1/2 Track Tape Recorder

_____Cassette Deck

Exhibit "3" Annexed to the Affidavit of Joseph Killian

_____Stage Monitor Speakers

_____Microphone (describe voice or type of instruments):

_____

_____

_____

_____

_____

_____Microphone Stands

Other Sound Requirements:

_____

_____

_____

_____

_____

Other General Technical Requirements:

_____

_____

_____

_____

_____

If you have any questions, please call the Bandshell Program Director at (212) 988-4460

NAME_____

SIGNATURE_____

DATE_____

Exhibit "3" Annexed to the Affidavit of Joseph Killian

City of New York-Parks & Recreation Permit No. ____

Special Event Permit Application Date_____

SUPPLEMENTARY SPECIAL EVENT PERMIT APPLICATION FOR CENTRAL PARK BANDSHELL

Before filing this application please read the "Special Event Guidelines" (on the back of the Special Event Application) and the "USE GUIDELINES FOR THE NAUMBURG BANDSHELL".

This application must be typed/printed in full.

Providing the proposed event is within the "USE GUIDELINES" and providing the dates requested are available the person listed below will be assigned the permit. Permits are non assignable and non transferable. Permittee must be present for the entire event.

APPLICANT INFORMATION

NAME_____

ADDRESS_____APT#_____

CITY_____STATE___ZIP CODE_____

PHONE/DAY ( )_____

PHONE/NIGHT ( )_____

ORGANIZATIONAL INFORMATION

ORGANIZATION_____

ADDRESS_____

CITY_____STATE___ZIP CODE_____

PHONE ( )_____

_____PROFIT_____NON PROFIT

Exhibit "3" Annexed to the Affidavit of Joseph Killian

If non profit IRS Tax Exempt Number_____

Federal identification Number_____

If organization does not have a Federal I.D. Number list
Applicants Social SecurityNumber_____
Primary purpose of organization_____

_____

TITLE OF EVENT AS IT IS TO BE PUBLIZED:

_____

First Choice of Date_____Rain Date_____

Second Choice of Date_____Rain Date_____

HOURS OF USE:

Set Up From_____To_____

Actual Event From_____To_____

Load Out From_____To_____

TECHNICAL INFORMATION

THE APPLICANT UNDERSTANDS THE DEPARTMENT OF PARKS AND RECREATION IS TO BE THE SOLE AND ONLY PROVIDER OF SOUND AMPLIFICATION. Applicant must fill out the attached Technical Requirements Form.

The Department of Parks and Recreation charges a Users Fee of $100 per performance hour; in addition a fee $100 is required for a one hour sound check. Do not send users fee with this application.

Do not send users fee with this application.

Amount due is to be paid within seven (7) days of permit approval. Following permit approval applicant must pay by

Exhibit "3" Annexed to the Affidavit of Joseph Killian

money order or certified check (cash and personal checks are unacceptable); checks payable to Cultural Council Foundation/Concert Fund.

CLEAN UP

Applicant is responsible for clean up. The three persons listed below must attend the event; provide ample industrial weight garbage bags; present themselves to DPR Bandshell Program Director or representative at the beginning of the event.

1) Name_____
Address_____ Apt. # _____
City_____ State_____ Zip Code_____
Phone_____

2) Name_____
Address_____ Apt. # _____
City_____ State_____ Zip Code_____
Phone_____

3) Name_____
Address_____ Apt. # _____
City_____ State_____ Zip Code_____
Phone_____

Exhibit "3" Annexed to the Affidavit of Joseph Killian

VEHICLES/SEE SPECIAL EVENT APPLICATION

As the applicant I agree to abide by the Department of Parks and Recreation Special Event Guidelines, as listed on the back of the Special Event Application; the Use Guidelines For The Naumburg Bandshell; and applicable Department of Parks and Recreation Rules and Regulations; with special notice to sound amplification, attendance, solicitation of funds, and concessions. I REALIZE THAT FAILURE TO FOLLOW THESE GUIDELINES CAN RESULT IN FORFEITURE OF BOND AND PROVIDE REASON TO DENY FOR MYSELF, THE ORGANIZATION, AND OTHERS INVOLVED ANY ALL FUTURE BANDSHELL PERMIT APPLICATIONS.

Name_____ Signature_____ _____

DATE_____

_____

DPR USE ONLY

1. Administrative Processing Fee AMT._____
   Date Received_____
2. Sound Amplification User Fee AMT._____
   Date Received_____
3. Bond AMT._____
   Date Posted_____
4. Insurance AMT._____
   Date Received_____

_____ _____
Bandshell Program Director Date

Exhibit "4" Annexed to the Affidavit of Joseph Killian

Proposal for Central Park Bandshell Sound Reinforcement System

SOUND ①

16 WEST 22nd ST.
NEW YORK, NEW YORK 10010

PROPOSAL FOR CENTRAL PARK BANDSHELL SOUND REINFORCEMENT SYSTEM

A. Equipment to be provided by Stager Sound Systems, hereafter referred to as "SSS":

1. Microphones: As many as the performance calls for, up to fifteen, or direct input boxes where appropriate as with synthesizers or electric guitars. SSS microphone stock consists of Shure SM 57's and SM 58's, RCA BK5B ribbon mics, and Sony ECM 53 broadcast condenser mics. SSS can also provide any direct boxes that may be necessary.
2. Tape Decks: Teac or Sony Dolby equipped stereo cassette decks are available. Should the performance require reel-to-reel playback SSS can provide a Teac 3340 for that purpose.
3. Mixing Console: Fender 4216 low noise sixteen input stereo mixing board with two independent monitor sends and two effects busses. Spec sheet enclosed.
4. Amplifiers: Modified Hafler P-500's and P-225's for the 'house' system. BGW 750B for the stage monitors.
5. Speakers: Bi-amplified main systems consisting of two 15" Gauss bass bins on each side of the stage

and two Turbosound TMS-1 mid and high frequency speaker boxes on each side of the stage. (Electronic crossover is a Crown VFX-2) Stage monitors are JBL wedges.

This system will be run by Marc Stager. It is sufficient to provide the bandshell area with undistorted stereo sound at loud but not unreasonable levels. There will also be an assistant who can competently set up and run system in an emergency.

Exhibit "5" Annexed To The Affidavit Of Joseph Killian
Portion Of Bids Under Evaluation

SOUND ②

G) we will come to all performances with back-up and spare equipment to insure very little down time if any, from broken equipment.

H) the system and its engineers have the capability to interface any type of electronic instrument, tape deck, video deck, or wireless equipment supplied by the performers.

I) our tape decks are capable of reproducing all the standard formats and speeds supplied by the performers.

J) we will supply the following equipment:

Mixing consoles	1-Walker Audio 2440 24 input channels 4 sub groups 4 auxilary outputs 2 monitor sends 2 effect sends
	1-Teac model 2A,6 inputs 4 outputs
Loudspeakers	4-John Meyer MSL-3 cabinets
	4-Electro voice 18" bass cabinets
	4-Electro voice 15"midrange cabinets
	2-Electro voice HR90 treble horns
	4-Yamaha 2115H two-way monitor cabinets
	2-Altec-Lansing 604 cabinets
Amplifiers	4-Yamaha P2201 power amplifiers
	4-Yamaha P2050 power amplifiers
	1-Yamaha P2100 power amplifiers
	1-Yamaha P2200 power amplifiers
Processing	1-Symetrix 501 compressor and limiter
	1-Aphex stereo aural exciter type B
	2-MXR one-third octave equalizers

Exhibit "5" Annexed to the Affidavit of Joseph Killian

	1-MXR dual fifteen equalizer
	1-Roland SDE 2000 digital delay
	1-Roland 201 space echo
	1-Ashley SC-77 stereo three-way electronic crossover
	2-John Meyer M3 processors
Microphone	8-Shure SM 57 mics (for vocals, drums, and guitars)
	5-Shure SM58 mics (for vocals, percussion and acoustic guitar
	4-AKG 451EB condenser mics (for violins, violas andpercussion)
	1-AKG D12E mic (for bass drum and acoustic bass)
	2-Sennhizer 421 mics (for woodwinds and horns)
	1-Beyer M69N mic (for vocals woodwinds and drums)
	2-ATM 10mics (for drums, percussion and strings)
	1-ATM 40 mic (for vocal and woodwinds)
	1-Nakamichi 200 (for drums and strings)
	5-Minicube direct boxes
Tape recorders	1-Teac 122 dual speed cassette deck
	1-Sony CD5 professional walkman cassette deck
	2-Teac 22-2 half track open reel decks
	1-Teac 22-4 four track open reel deck

Exhibit "5" Annexed to the Affidavit of Joseph Killian

Microphone stands	16 boom type mic stands 8 straight mic stands 4 small mic stands
Cables	all the cables necessary to interface the systems components all equipment is rack mounted

K) the system is capable of either mono or stereo operation

This letter is a formal bid and does constitute a final contract for any services between _____ and the Central Park Administration. If the elements in this bid are excepted, a formal contract will be drawn up by Hear No Evil and signed by both parties.

Thank you For Your Consideration

Clients:

THE PUBLIC THEATRE, NYC
DELACORTE THEATRE, CENTRAL PARK

Exhibit "6" Annexed to the Affidavit of Joseph Killian
Sound Specifications

SOUND SPECIFICATIONS 3

2 MSLI MSL3 Speaker
Lot CL 7 S NC 12 Monitor Speaker
1 MSLI M3 Processor
Lot Crown Amplifiers for NC12 Speakers
2 Crown MT 1000 Ampliers for MSL3 Speakers
1 UREI 1/3 Octave Graphic Equalizer
1 E/V TAPCO 8416 Mixing Deck
1 SONY Cassette Deck for cassette playback
1 TEAC 3440 or Otari 5050B for tape playback
Lot Trucking, Set Up, Engineering

Clients: Radio City Music Hall
Carnegie Hall
Lincoln Center Out-of-Doors Festival
MTV Video Awards
Kool Jazz Festival

Exhibit "7" Annexed to the Affidavit of Joseph Killian
System and Equipment Available

SYSTEMS AND EQUIPMENT AVAILABLE

16 x 2
24 x 6 HOUSE MIX CONSOLES
32 x 10 x 8

BROOKE-SIREN FREQUENCY DIVIDING NETWORKS
KLARK-TEKNIK DN 360 1/3 OCTAVE EQUALISERS
DBX 900 LIMITER /COMPRESSORS
LEXICON PCM-42 DIGITAL DELAY
LEXICON PCM-60 DIGITAL REVERB

CARVER PM 1.5 POWER AMPLIERS

TURBOSOUND TMS-4 FULL*RANGE SPEAKER SYSTEMS

(MONITOR FORMATS)

2—MIX (from house console)

4—MIX
6—MIX YAMAHA MC2408M 24 x 8
MONITOR MIX CONSOLE
8—MIX

:::::WEDGES::::: BI-AMP JBL15" & 1" OR 2" HORN

ALL 1/3 OCTAVE EQUALISERS
CARVER & CROWN POWER AMPLIFIERS

ALL STANDARD MICS: SHURE 57, 58, AKG 451, SENN 421, EURRIO, 20

Exhibit "8"Annexed to the Affidavit of Joseph Killian
Plaintiff's Special Event Permit Application

NYC Department of Parks & Recreation
Special Event Permit Application

Date *1/2/86*
Borough *Man.*

Applicant *JAMES FOSBINDER, Att. FOR RAR* *212 6774899*
Name Telephone No.

2647 Broadway, box 2W NYC, NY 10025
Address

Organization/Sponsor *Rock Against Racism, NYC*
Name Telephone No.

Type of Organization (Social, Political, Commercial) *Cultural-Political*

Names, Addresses, Telephone Numbers of Three Organization Members Besides Applicant:

1. _____
2. _____
3. _____

List any event, with dates previously held in NYC parks by this organization. *The last seven years this*

Date of Event *MAY 4th, 1986* Rain Date *May 11th*

Name of Park *Central Park Bandshell Area*

Type of Event (Rally, Concert, Race, Promotion, etc.) *Rally/Concert*

Number of Participants *5-15,000*

Exact Location In Park *Bandshell Area at 72nd Street*

If Appropriate: Start Location *Washington Square Park 12 noon-1 PM*
Finish Location *Central Park Bandshell area*
Route Through Park *UP 5th avenue &*
through east 72ND street

Exhibit "8" Annexed to the Affidavit of Joseph Killian

List in detail activities planned. (Sale or distribution of food, products, promotional material, celebrities, speeches, ceremonies, etc.)

① *Bathrooms-IN: Bethesda Fountains, Mineral Springs, the park behind the bandshell & the backstage must be open & in working order from 7am till 10pm.*

② *Barricades must be available to us.*

③ *Street lights IN FroNt of baNdshell must be used at dusk.*

④ *Stage and beNches must be available.*

(When appropriate to event, applicant should attach logistical sketch showing physical arrangement, routes.)

Set-up, dismantling, clean-up time: from *4am* to *4am (24hrs.)*

Actual performance time from *12NOON* to *10:00PM*

Will event be advertised? *Yes* How? *IN maNy ways*

When? *all the time*

Will prizes/gifts be distributed or awarded? _____

If so, Type: _____

Will participants or spectators be charged? *NO*

If so, Amount: _____

Check requirements for event and see guidelines on back of form.

VEHICLES *3 heavy trucks for production*
20 cars or vans for band equipment
23 total vehicles

ELECTRICAL Required *X* Not Required _____

ENERGY Type *120 VAC, 25 AMPS*

Music for/at Event *Access before 10AM*

Electrical Amplification *6000 Watts Audio power output*

Exhibit "8" Annexed to the Affidavit of Joseph Killian

As the applicant, I hereby agree to abide by the Rules & Regulations of the Parks Department and by the terms set forth in this application.

_____
Signature of Applicant

ADMINISTRATIVE PROCESSING FEE AMT. *$100.00* DATE RECVD. _____	CONCESSIONS FEE AMT. _____ DATE RECVD. _____
BOND AMT. *1000.00* DATE POSTED _____	INSURANCE AMT. *1-3 MIL* DATE RECVD. _____
APRM/BOROUGH _____ APPROVED _____ DISAPPROVED _____ DATE _____	APRM/RECREATION _____ APPROVED _____ DISAPPROVED _____ DATE _____
BOROUGH COMMISSIONER _____ APPROVED _____ DISAPPROVED _____ DATE _____	ARSENAL DISPOSITION _____ SPECIAL EVENTS _____ CONCESSIONS _____ M&O _____

Memorandum Opinion and Order of Haight, J. Entered May 2, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,
Plaintiff.

- against -

85 Civ. 3000 (CSH)

HON. BENJAMIN R. WARD, in his official capacity as Police Commissioner for the City of New York, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

The parties are again before the Court within the context of plaintiff Rock Against Racism's ("RAR") annual concert in Central Park. I say "again" because this litigation was generated by last year's concert. This year's concert is scheduled for May 4, 1986, at the Naumburg Bandshell between the Mall and Bethesda Terrace. RAR seeks, on First Amendment grounds, an injunction prohibiting defendants from applying to RAR certain guidelines drafted by the Department of Parks and Recreation for use of that locality.

Commissioner Henry J. Stern promulgated those guidelines under date of March 21, 1986. They were the work product of Joseph Killian, program director for that much-used area of the park. Mindful of various organizations' applications to hold events there, Killian contacted them. One of these was RAR. It is not disputed that Killian telephoned RAR representatives on Monday, March 24, to advise them of the issuance of the use guidelines. RAR acknowledges receiving a copy at "the end of

March, 1986." Brief at 2. RAR filed this application on April 23. To give defendants some time to confront the constitutional issues, I made the motion returnable on May 1, when oral argument was heard.

The timing does not permit extended analysis or discussion. It also has consequences for which RAR is responsible. This application was unduly delayed. Based on past history, RAR could have had no reasonable expectation that defendants would waive these guidelines on RAR's request. In any event, April 9, Killian advised RAR's counsel, James Fosbinder, that the guidelines would be enforced. Mr. Fosbinder thereupon left to conduct a trial in Arizona. No arrangements were made to bring the dispute to the Court before April 23. No evidentiary record exists except the opposing affidavits. In these circumstances, RAR is entitled to relief only to the extent that such entitlement appears as a matter of law from the face of the papers.

(1) *The sound system.*

In prior years, including last year, RAR used its own sound system.

The guidelines provide that the Department "is the sole and only provider of sound amplification"; "user fee of $100 per performance hour, plus a one hour sound check is charged."

This guideline would require RAR to abandon its own system, which it used without complaint by the City last year, and use different equipment whose knobs and dials would be twisted by the hands of strangers—in point of fact, private contractors hired by the City but paid for by RAR. It is recognized that "live musical expression is protected by the first amendment." *Cinevision Corp.* v. *City of Burbank*, 745 F.2d 560, 569 (9th Cir. 1984). I agree with RAR that, absent significant governmental interest requiring a different result, that protection extends not only the words and songs presented but also the sound which actually emanates from the amplification system. That sound may be substantially

affected by the amplification system itself and who controls it. To paraphrase the old song: "The music goes round and round, but it comes out *here.*"

Here there is no significant government interest. RAR acknowledges this year, as it did last year, the constitutional validity of those general park regulations which limit sound. Defendants do not suggest that RAR, using its own equipment, breached those regulations last year. There is no reason to assume it will this year. As a general rule, prospective restraints even of criminal behavior are unconstitutional. *Fernandes* v. *Limmer* , 663 F. 2d 619, 628 (5th Cir. 1981), *rehearing denied*, 669 F. 2d 729, *cert. denied*, 458 U.S. 1124 (1982).

(2) *Financial Aspects.*

RAR complains of the increased cost of obtaining this year's permit.

The cost elements are: a $100 fee to process the application; the $100 per hour sound system use charge; a $1,000 cleanup bond; and the cost (as yet undermined) of obtaining a one-day liability policy in the defendant requires: $1 million/$3 million.

The sound system charge disappears because of my holding under Point (1), *supra.*

The rule in this circuit is that: "Licensing fees used to defray administrative expenses are permissible, but only to the extent necessary for that purpose." *Eastern Connecticut Citizens Action Group* v. *Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983), citing *Fernandes* v. *Limmer, supra.* At least in a case where the plaintiff user pleads and proves its inability to pay such charges, and gives the defendant property owner sufficient notice of that claim to justify the fee, the defendant is required to submit evidence that the administrative fee charged is equal to the cost incurred or to be incurred by defendant for processing plaintiff's request to use the property. *Id.*

In the case at bar, RAR paid the processing fee last year, pursuant to a settlement approved by the Court. Unlike the plaintiff *Eastern Connecticut Citizens Action Group*, the present plaintiff makes no showing of a present inability to afford the licensing fee, or to furnish the $1,000 cleanup bond, again an amount equal to last year's requirement. RAR's motion papers this year list the $100 license fee as an objectionable requirement, but do not say why. If the argument is that a licensing fee is unconstitutional *per se*, *Eastern Connecticut Citizens Action Group* is to the contrary. If RAR's argument is that defendants have not offered sufficient proof of the necessity of that particular amount, the answer is that RAR did not make the present application in sufficient time to put defendants on notice of the necessity of such a showing , or indeed to permit it . It was represented by defendants' counsel at argument that the scale of fees, ranging from $50 through $75 through $100, depends upon the estimated number of attendees at the event. One can plausibly assume that larger events require further administrative expenses. In any event, RAR is not in a position on this on this record to complain of this fee.

For the same reasons, I reach the same conclusion on the "repeat" of last year's $1,000 cleanup bond (all of which, plaintiff's counsel advises, was returned at the end of last year's concert)

The requirement for liability insurance is new from last year. Such a condition for public gatherings and exercise of First Amendment freedoms was considered by the Second circuit in *Eastern Connecticut Citizens Action Group, supra,* and in *Collin* v. *Smith*, 447 F. Supp. 676 (N.D.Ill. 1978), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978). In both *Collin* and *Eastern Connecticut Citizens Action Group*, the plaintiff user pleaded and proved that it either could not afford or could not obtain the insurance as a condition of use. Both courts concluded that the requirement was unconstitutional as applied. The Seventh Circuit concluded that "we do not need to determine now that no insurance requirement could be imposed in any circumstances," re-

garding that as "a close question." 578 F.2d at 1208. In the Second Circuit, however, I regard that question as having been answered in the affirmative. Although defendant lost on the facts of the case, Judge Kaufman recognized for the court that "the state has a legitimate interest in protecting itself from liability for injuries associated with the use of its property," 723 F.2d at 1056, and added: "Nor do we suggest that DOT's fee and insurance requirements would not be valid when reasonably applied." *Id.* at 1057.

In appropriate circumstances, the defendant public authority may be put to its proof that the insurance requirement is valid, and the amount requested reasonable. That is the analysis in *Eastern Connecticut Citizens Action Group, supra,* at 1056-57. But again, in the case at bar, RAR has simply failed to proceed in sufficient time and in appropriate form to fairly pose these issues of fact. I interpret RAR's argument to be that the liability insurance requirement is *per se* unconstitutional. Again, *Eastern Connecticut Citizens Action Group* is to the contrary. RAR offers no proof that, although able to afford insurance it could not obtain it, as in *Collin* v. *Smith, supra,* at 684; or that the insurance, while available, was beyond plaintiff's economic means, as in *Eastern Connecticut Citizens Action Group.* The only argument RAR gave defendants notice of in their motion papers is that since the City does not require individual bicyclists, roller skaters, joggers or frisbee players to insure themselves, it is "unfair" to require the organizers of mass activities to do so. Brief at 6. The argument is frivolous. Defendants did not receive timely and sufficient notice of the arguable constitutional claim, and cannot be criticized for furnishing a more detailed record in opposition to it.

I decline to relieve RAR of the liability insurance requirement.

(3) *Hours of the Event.*

The remaining dispute relates to the hours of the event. It is not entirely clear, from the briefs as amplified by oral argument, what the boundaries of this dispute are, or indeed if there is one.

The remarks of defendants' counsel at argument sounded, at one point, as if defendants were offering the same bloc of time to RAR this year that RAR used last year.

In like vein, RAR's counsel seemed at one point to be requesting the same time as last year. If there is a dispute, it would seem to arise out of the provision in the guidelines that "Festivals may be permitted between 12:00 P.M. and 6:00 P.M." The guidelines go on to provide that: "Evening performances are permitted under certain circumstances. Evening events must be finished by 9:30 P.M." If I understand RAR correctly, it may wish to continue until 7:00 P.M. this year. In view of the fact that the guidelines permit "evening performances" to run until 9:30 P.M., and RAR is asking only for an extension of its First Amendment expression to and including 7:00 P.M., the defendants have failed to demonstrate a constitutionally sufficient basis for cutting RAR off at 6:00 P.M. Accordingly, and assuming RAR meets the other requirements, the permit will extend the permitted usage to 7:00 P.M., if RAR so requests.

In view of the holding that RAR may use its own sound system, the hours for setting the equipment up and taking it down again will be modeled upon the procedures followed without controversy last year.

The foregoing constitutes the Court's findings of fact and conclusions of law. It is SO ORDERED.

Dated: New York, New York
May 1, 1986

s/ Charles S. Haight, Jr.
CHARLES S. HAIGHT, JR.
U. S. D. J.

Amended Complaint, entered on November 5, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

- against -

HONOR BENJAMIN R. WARD, in his official capacity as Police Commissioner of New York;

GEORGE SCARPELLI, in his official capacity as Chief of Operations for Department of Parks;

SHELDON HOROWITZ, in his official capacity as Special Events Director for the Department of Parks,

ROBERT RUSSO, in his official capacity as Assistant Parks Commissioner for Citywide Services, New York City Department of Parks and Recreation;

JOSEPH KILLIAN, in his official capacity as Program Director for the Mall/Bandshell of the Bethesda Terrace area of Central Park in the City of New York, Department of Parks and Recreation;

MAYOR EDWARD KOCH, in his official capacity as the Mayor of the City of New York; and

THE CITY OF NEW YORK,

Defendants.

AMENDED
COMPLAINT
85 Civ. 3000
(CSH)

Amended Complaint entered on November 5, 1986

Plaintiff by his undersigned as attorney, complaining of defendants alleges as follows:

PARTIES

1. Plaintiff Rock Against Racism (Hereinafter "RAR") is an unincorporated associate in organized to protest racism in the United States and around the world.

2. Honorable Benjamin Ward is the Commissioner of the New York City Police Department. Defendant Ward is being sued in his official capacity.

3. Defendant George Scarpelli is the Chief of Operations for the Department of Parks, City of New York. Defendant Scarpelli is being sued in his official capacity.

4. Defendant Sheldon Horowitz is the Special Events Director for the Department of Parks, City of New York.

5. Defendant Joseph Killian is the Program Director for the Central Park Bandshell, Department of Parks, and Recreation, City of New York. Mr. Killian is being sued in his official capacity.

6. Defendant Robert Russo is being sued in his official capacity as Assistant Parks Commissioner for City Wide Services, New York City Department of Parks and Recreation.

7. Mayor Edward Koch is being sued in his official capacity as the Mayor of The City of New York.

8. Upon information and belief the City of New York is an incorporated municipality under the laws of the State of New York.

Amended Complaint entered on November 5, 1986

JURISDICTION

9. This action arises under the Constitution and laws of the United States as follows

a. The First and Fourteenth Amendments to the United States Constitution;

b. 29 U.S.C. §§1331, 1332, 1341, 1651 and 2201;

c. 42 USC §§ 1981 et. seq.

d. Federal Declaratory Judgment Act Title 28

United States code §2201 for the purpose of determining a question of actual controversy between the parties as hereinafter appears.

FACTS

10. Rock Against Racism is an unincorpoarted organization that is dedicated to protesting racism in the Untied States. As part of their agenda to protest racism RAR is involved with the medium of electronic music as a way of expressing their political, social, cultural, artistic and ethical views. The use of electronic music is inseperable from the message itself and one cannot be clearly understood without the other.

11. As part of their activities RAR presents a concert/public forum on the issue of racism in the Untied States. This concert/public forum takes place in the Naumburg Bandshell in Central Park in early May. This concern/public forum has been presented for the past 8 years in early May.

12. As part of the early May event many speakers, artists and political thinkers are invited from many states and foreign countries. The event is eagerly anticipated by thousands of New Yorkers and non-New Yorkers. The attendance is between 5-15,000 people.

Amended Complaint entered on November 5, 1986

13. As part of the promo ion of this event the plaintiff actively publicizes the event. At the event itself literature is distributed on the issue of racism in the United States.

14. The Naumburg Bandshell is very centrally located in the lower part of Central Park and is very convenient for all who would like to attend including the handicapped. In addition, the cite of the Naumburg Bandshell has become synonymous with the event itself. Any other site in the City of New York will effectively chill the exercise of plaintiffs free speech.

15. For thousands of New Yorkers the event has become a Traditional spring event.

16. In March 1985, plaintiff applied for a permit to use the Naumburg Bandshell for their spring event. This was their third choice of sites. The plaintiffs originally wanted to hold their event in the Sheep's Meadow or the Great Lawn in Central Park, New York. They were denied both of these sites by the defendants for arbitrary reasons, being forced to apply for their third choice the Naumburg Bandshell.

17. Plaintiff was told that their application had been categorically denied. There was no legitimate reason for said denial.

18. Although substitutions were suggested by the Department of Parks and Recreations, these substitute sites were all located far from mid-town Central Park. These substitute sites were difficult if not almost impossible to get to. The substitute sites by their very nature would have chilled plaintiff's exercise of their right to free speech and association. In sum, the comprable sites were in no way, shape of form comparable to the Naumburg Bandshell.

19. Plaintiff has always demonstated a willingness to enter into good faith negotiations as to the time of the event, the staging etc. and have never conveyed an unwillingness to discuss details related to public safety.

Amended Complaint entered on November 5, 1986

20. Upon information and belief the only reason for defendants actions is hostility toward the views of plaintiffs.

21. In or about April 1985, a prelimiary injunction was brought in this action and as a result a settlement was agreed upon with the Department of Parks to allow plaintiff's event to take place.

22. In May 1985, the annual spring event was held.

23. In or about March 1986, as part of this courts ruling two sets of regulations were promulgated which were to outline a more orderly procedure of the securing of the Naumburg Bandshell, without the previously experienced infraction on plaintiff's free speech rights.

24. On or about March 21, 1986, Defendant Joseph Killian promulgated "Use Guidelines for the Naumburg Bandshell in Central Park" Upon information and belief these guidelines were authorized by all the defendants.

25. The guidelines violate plaintiffs First Amendant Right to free speech and association in that they:

a. Illegally regulate the hours of plaintiffs event at the Bandshell.

b. Illegally prescribe guidelines which regulate the manner and presentation of sound through a sound system.

c. Illegally prescribe and require a permit fee and fee for use of required sound system.

d. Illegally regulate the number of persons who can attend any event.

e. Illegally regulate the distribution of handbills, flyers or posters and illegally regulate the use of flags and banners.

f. Illegally and unclearly regulate the grounds for evaluating whether all terms and conditions of the guidelines have been complied with.

Amended Complaint entered on November 5, 1986

g. Illegally require insurance bonds, and other bonds.

26. In addition, the guidelines are totally arbitrary in that they do not establish or effectuate a neutral policy by which events can be judge as to whether there are violations of the regulations.

COUNT ONE

27. Plaintiff repeats and realleges paragraph one (1) through twenty-six (26) and incorporates these as paragraph twenty-seven (27).

28. The aforementioned facts demonstrate an intention on part of the City to deprive the plaintiff and others of their fundamental rights and privileges guaranteed to them by the First and Fourteenth Amendments to the Constitution of the United States.

SECOND CAUSE OF ACTION

29. Plaintiffs repeats and realleges paragraphs one (1) through twenty-eight (28) and incorporates them as paragraph twenty-nine (29).

30. The action of the plaintiff's First Amendment rights to free speech and association, in that the regulations impermissibly chill and infringe on plaintiff's exercise of their Constitutionally protected rights. As such the plaintiff's invoke the Declartory Judgment Act of the United States Code §2201 for the purpose of determining a question of actual controversy as has been previously outlined herein.

31. As has been shown by the following facts plaintiff has exhausted all administrative remedies available for the protection of their rights.

WHEREFORE, plaintiff prays that

1. The Court enter a judgment for compensatory damages, for count one for an amount yet undetermined with punitive damages and attorney's fees, cost and disbursements in this actions.

Amended Complaint entered on November 5, 1986

2. The Court enter judgment for declartory action striking the New York City Department of Parks and Recreation Regulations which purport to regulate the activities at the Naumburg Bandshell but in fact and reality serve to infringe on plaintiff's first amendment rights to free speech and association; with punitive damages and attorney's fee costs and disbursements of this action.

Dated: New York, New York
October 30, 1986

s/ Noah A. Kinigstein
NOAH A. KINIGSTEIN
370 Seventh Avenue, Suite 1812
New York, NY 10001
(212) 868-2000

JIM FOSSBINDER
8450 Old Spanish Trial
Tuscon, Arizona

Answer to Amended Complaint by Defendants Ward, Scarpelli, Horowitz, Russo, Killian and The City of New York, Entered December 1, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,
Plaintiff,

- against -

HON. BENJAMIN R. WARD, in his official capacity as Police Commissioner for the City of New York, et. al.
Defendants,

ANSWER TO AMENDED COMPLAINT
85 Civ. 3000 (CSH)

Defendants, BENJAMIN R. WARD, GEORGE SCARPELLI, SHELDON HOROWITZ, ROBERT RUSSO, JOSEPH KILIAN, AND THE CITY OF NEW YORK by their attorney, FREDERICK A.O. SCHWARZ, JR., Corporation Counsel of the City of New York, as and for their answer to the amended complaint, respectfully allege as follows:

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "1" of the amended complaint.

2. Admit the allegations set forth in paragraph "2" of the amended complaint.

3. Deny the allegations set forth in paragraph "3" of the amended complaint, except admit that George Scarpelli is Manhattan Borough Chief of Operations in the City of New York Department of Parks and Recreation.

4. Admit the allegations set forth in paragraphs "4", "5", "6", "7", and "8" of the amended complaint.

5. Deny the allegations set forth in paragraph "9" of the amended complaint, except admit that jurisdiction is asserted by plaintiff to be conferred upon this court by the statutory and constitutional sections cited in paragraph "9" of the amended complaint.

6. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the first sentence of paragraph "10" of the amended complaint, and deny the allegations set forth in the second and third sentences of paragraph "10" of the amended complaint.

7. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the first sentence of paragraph "11"of the amended complaint, and deny the allegations set forth in the second and third sentences of paragraph "11" of the amended complaint, except admit that plaintiff has held an event at the Naumburg Bandshell in Central Park during the month of May in the years 1979-1986.

8. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the first two sentences of paragraph "12" of the amended complaint, and deny the allegations set forth in the third sentence of paragraph "12" of the amended complaint.

9. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "13" of the amended complaint.

10. Deny the allegations set forth in paragraph "14" of the amended complaint, except admit that the Naumburg Bandshell is located at approximately 72nd Street in Central Park.

11. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "15" of the amendment complaint.

12. Deny the allegations set forth in paragraphs "16" of the amended complaint , except admit that plaintiff applied in March

1985 for an event permit to use the Naumburg Bandshell in Central Park.

13. Deny the allegations set forth in paragraphs "17", "18", "19", "20", "21", "22" ,"23", "24", "25", and "26" of the amended complaint.

14. With respect to paragraph "27" of the amended complaint, defendants repeat and reallege their responses as set forth in paragraphs "1" through "13" of this Answer.

15. Deny the allegations set forth in paragraph "28" of the amended complaint.

16. With respect to paragraph "29" of the amended complaint, defendants repeat and reallege their response as set forth in paragraphs "1" through "15" of this Answer.

17. Deny the allegations set forth in paragraphs "30" and "31" of the amended complaint.

AS AND FOR A FIRST SEPARATE AND COMPLETE DEFENSE:

18. The complaint fails to state a claim upon which relief may be granted.

AS AND FOR A SECOND SEPARATE AND COMPLETE DEFENSE:

19. The defendants have not violated any rights, privileges, or immunities secured to the plaintiff and have acted in accordance with the United States Constitution and federal laws and all other applicable rules, regulations, and procedures.

AS AND FOR A THIRD SEPARATE AND COMPLETE DEFENSE:

20. In the performance of the acts complained of, defendants performed official functions and duties in good faith and in

accordance with the provisions of the United State Constitution and all other applicable laws and statutes.

AS AND FOR A FOURTH SEPARATE AND COMPLETE DEFENSE:

21. Defendants have no official policy, custom, statute, or regulation which permits or promotes the violation of any person's civil rights, nor were the defendants' actions or actions based upon any indifference to plaintiff's constitutional rights or hostility towards the views of the plaintiff.

Dated: New York, New York
November 25, 1986

FREDERICK A.O. SCHWARZ, JR.
Corporation Counsel of the
City of New York
Attorney for Defendants
100 Church Street, Rm. 6-C-41
New York, New York 10007
(212) 566-2185

By: s/ Chad A. Vignola
CHAD A. VIGNOLA
Assistant Corporations
Counsel

Answer to Amended Complaint by Defendant Koch, entered December 2, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

- against -

HON. BENJAMIN R. WARD in his official capacity as Police Commissioner of New York, et al.

Defendants

ANSWER TO AMENDED COMPLAINT

85 Civ. 3000 (CSH)

. Defendant, EDWARD KOCH, by his attorney, FREDERICK A.O. SCHWARZ, JR., Corporation Counsel of the City of New York, as and for his answer to the amended complaint, respectfully alleges as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "1" of the amended complaint.

2. Admits the allegations set forth in paragraph "2" of the amended complaint.

3. Denies the allegations set forth in paragraph "3" of the amended complaint, except admits that George Scarpelli is Manhattan Borough Chief of Operations in the City of New York Department of Parks and Recreation.

4. Admits the allegations set forth in paragraphs "4", "5", "6", "7", and "8" of the amended complaint.

5. Denies the allegations set forth in paragraph "9" of the amended complaint, except admits that jurisdiction is asserted by

plaintiff to be conferred upon this court by the statutory and constitutional sections cited in paragraph "9" of the amended complaint.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the first sentence of paragraph "10" of the amended complaint, and denies the allegations set forth in the second and third sentences of paragraph "10" of the amended complaint.

7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the first sentence of paragraph "11" of the amended complaint, and denies the allegations set forth in the second and third sentences of paragraph "11" of the amended complaint, except admits that plaintiff has held an event at the Naumberg Bandshell in Central Park during the month of May in the years 1979-1986.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the first two sentences of paragraph "12" of the amended complaint, and denies the allegations set forth in the third sentence of paragraph "12" of the amended complaint.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "13" of the amended complaint.

10. Denies the allegations set forth in paragraph "14" of the amended complaint, except admits that the Naumburg Bandshell is located at approximately 72nd Street in Central Park.

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "15" of the amended complaint.

12. Denies the allegations set forth in paragraph "16" of the amended complaint, except admits that plaintiff applied in

March 1985 for an event permit to use the Naumberg Bandshell in Central Park.

13. Denies the allegations set forth in paragraph "17", "18", "19", "20", "21", "22", "23", "24", "25", and "26" of the amended complaint.

14. With respect to paragraph "27" of the amended complaint, defendant repeats and realleges its responses as set forth in paragraphs "1" through "13" of this Answer.

15. Denies the allegations set forth in paragraph "28" of the amended complaint.

16. With respect to paragraph "29" of the amended complaint, defendant repeats and realleges its responses as set forth in paragraphs "1" through "15" of this Answer.

17. Denies the allegations set forth in paragraphs "30" and "31" of the amended complaint.

AS AND FOR A FIRST SEPARATE AND COMPLETE DEFENSE:

18. The complaint fails to state a claim upon which relief may be granted.

AS AND FOR A SECOND SEPARATE AND COMPLETE DEFENSE:

19. Defendant has not violated any rights, privileges, or immunities secured to the plaintiff and has acted in accordance with the United States Constitution and federal laws and all other applicable rules, regulations, and procedures.

AS AND FOR A THIRD SEPARATE AND COMPLETE DEFENSE:

20. In the performance of the acts complained of, defendant performed official functions and duties in good faith and in

accordance with the provisions of the United States Constitution and all other applicable laws and statutes.

AS AND FOR A FOURTH SEPARATE AND COMPLETE DEFENSE:

21. Defendant has no official policy, custom, statute, or regulation which permits or promotes the violation of any person's civil rights, nor were the defendant's actions or actions based upon any indifference to plaintiff's constitutional rights or hostility towards the views of the plaintiff.

Dated: New York, New York
November 26, 1986

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel of the
City of New York
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By: s/ Chad A. Vignola
CHAD A. VIGNOLA
Assistant Corporation
Counsel

Transcript of Proceedings On March 23-25, 27, 30, 31 and April 1, 1987 Testimony of Alan Thompson, Witness on Behalf of Plaintiff

Thompson—Direct

(72) ALAN THOMPSON,

called as a witness by the plaintiff, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KINIGSTEIN:

Q. Mr. Thompson, where do you live?

A. I live at 2647 Broadway at 100th Street.

Q. Are you familiar with the group Rock Against Racism?

A. Yes, I am.

Q. Could you tell us how you're involved?

A. My involvement is to arrange the sound system and to assist in booking bands.

Q. Are you paid for your work?

A. No, I am not. RAR is an all-volunteer group.

Q. How many years have you been involved with Rock Against Racism?

A. I have been involved since 1981.

Q. Have you been involved in the promotion of the annual spring event in Central Park?

A. Yes.

(73) Q. In what capacity is that?

A. When everything else is finished and I have made sure the sound system is working and the bands are all going to be there, I get out the paste bucket and I go postering and I hand out leaflets in front of concerts and I do whatever I can to encourage my friends to leaflet and so on and so forth.

Q. On the day of the concert itself do you have any role?

A. On the day of the concert itself my role is primarily to set up and engineer the sound system and my secondary role is to make sure the stage manager is operating in full capacity in dealing with all the bands.

Q. Could you describe a little bit what you mean by engineering the sound? What does that really mean?

A. Engineering the sound means setting up all the individual microphones on all the individual instruments, such as, for instance, the drum set would have as many as eight to ten microphones on each drum and cymbal, and what I do is, once all the microphones are set up on the bass and the guitars and the keyboards and so on and so forth, then it's all plugged into a mixing desk, and my job as engineer is during the performance—

Q. Wait a minute. Let's take it a step at a time here. What is a mixing desk?

(74) A. A mixing desk is a console that combines multiple signals into one signal which is then fed into a sound system.

Q. Can you describe for us what that means in real terms?

A. If a band is set up you can either put one microphone on the entire band or you can put individual microphones on the individual instruments and mix them into one signal and feed it into a sound system.

Q. You're at this board, is that correct?

A. Yes, I am at the board, and basically during the performance I am part of the band, because I am balancing all of their instruments together to sound right to their taste.

Q. How do you know what their taste is?

A. They have their manager and/or their own sound mixer present at my elbow.

Q. And what—

A. Or they tell me what they want previously and they give me a list of the songs, saying they want echo or reverb here or there and they want this and that.

Q. What is that, echo and reverb?

A. Effects. Like they will want certain effects at certain times and they will give me a list of songs and at each song they will say what type of sound they want for (75) each song, or they will just station one of their own people with me, which is more common.

THE COURT: At a particular time in a performance can the sound mixer, for example, build up one particular instrument and relatively play down others?

THE WITNESS: Exactly. When the guitarist is about to take a lead, for instance, there will be a slight boost just to improve the dynamics, so you can hear the guitar clearly over the rest, yes. Sometimes it's accomplished by turning the rest down so that it doesn't overpower the audience and sometimes it's accomplished by simply boosting that one signal.

Q. On the soundboard, if you can approximate, how many different individual variations are there for a song?

A. Well, I have somewhere between 200 and 300 separate adjustments that can be made, and during the course of a song my hands will be moving all over the board continually, constantly making adjustments. I can't really tell you—estimate how many adjustments I make, but there are quite a few knobs to turn.

Q. Do these 200 to 300 knobs interrelate with each other as well?

A. Excuse me. I don't understand the question.

Q. Let me give you a hypothetical.

A. Go ahead.

(76) MR. PINES: Object, your Honor. This is not an expert.

THE COURT: Oh, I don't know. He knows more about it than I do. It may assist, Mr. Pines. Let's hear the question and see if it's useful.

Q. Let's say you're raising a certain level on the lead guitar while at the same time doing something to a bass drum or a bass guitar. Those dials interrelate with one another, so that really it's not just an automatic thing but rather you have to know what this dial is in relation to other dials?

A. Right.

Q. And regarding the song?

A. Yes.

MR. PINES: I object to that question as leading.

THE COURT: I have more trouble understanding what it means. If I am supposed to derive something from that last exchange you're going to have to rephrase it.

THE WITNESS: Yes, me too.

MR. KINIGSTEIN: I will rephrase it, your Honor.

Q. Does the manipulation of the dials require any type of artistic understanding?

A. Absolutely. For instance, when you have a concert where there is several different types of music available one has to have a very deep understanding of what (77) a reggae audience or a reggae band would want other than a folk type of band. In other

words, in a reggae type of thing the high hat is supposed to be louder than in any other type of band and the bass guitar is supposed to be very dominant and very boomy and when you go to the next band they want a completely different setup.

Q. How long have you worked the soundboard for the Rock Against Racism concerts in New York at the bandshell?

A. Repeat the question. I thought I just answered that.

Q. How many years have you worked the soundboard?

A. Since 1981. Actually, in 1981 we rented a system. So I guess I was the chief engineer from 1982 on.

Q. How many concerts have you given for Rock Against Racism across the country?

A. I would say, since 1980, somewhere around 200, maybe more.

Q. That's on the soundboard?

A. That's on the soundboard.

Q. Regarding the Rock Against Racism concert in Central Park, are you familiar with environmental concepts that could affect sound?

A. Yes, I am.

Q. Do you take these into consideration as well when you engineer the concert?

(78) A. I do—there are some that have to be disregarded, such as wind. Like the wind can change direction and come and go, increase and decrease, and there really isn't a whole lot you can do about it, except be aware of which direction it's going to generally be flowing. That's just one example.

Q. I call your attention to the concert in 1984, the Rock Against Racism concert. Do you recall that?

A. Yes.

Q. You testified you were on the soundboard that day, is that correct?

A. Yes, I was.

Q. And it was at the bandshell?

A. Yes.

Q. Do you recall if you had any interaction with the Parks Department or the Police Department on that particular day at the concert itself regarding the sound level?

MR. PINES: Your Honor, I would object to this line on the basis that it's cumulative if what the plaintiff is asking is about interference with the soundboard, which has already been testified to by Miss Robb.

THE COURT: I think it's a legitimate line of inquiry, Mr. Pines. This is a witness perhaps in a (79) position to give additional detail. Perhaps I won't hear a third witness on the subject, but I will hear this one.

A. I believe the year that the police put their hands on the board was '83. There has basically been incidents every year except 1986 where Parks Department people and police officers come up and try to engage me in a dialogue and try to talk to me and distract me from doing my job, which is to balance all the instruments together and essentially perform as another performer of the band.

MR. PINES: Your Honor, I object to the response on the grounds that it attempts to state what the police officers were trying to do as opposed to what they did and it is speculation on the police officers' state of mind.

THE COURT: Yes. To that extent I will disregard it. The preferable form would simply be to ask the witness what occurred.

Q. What did occur, if anything, at the concert in 1983?

A. In 1983 there was a band playing and they go by the name Millions of Dead Cops. Their name also means Multi Death Corporation and it also means Missle Destroyed Civilization. Basically they go by the name MDC and it has a variety of different meanings. But they had introduced themselves this particular year as Millions of Dead Cops.

While they were playing, three to four police (80) officers came up behind me. There was no one else from my group with me. I was surrounded by these officers. One of them came up right behind my ear and asked me which knob controls the master volume. I told him and he proceeded to place his hands on the knob and turn it down in a jarring fashion, so that the whole crowd whirled around to find out what went wrong with the sound.

MR. PINES: Objection as to what the whole crowd whirled around for.

THE WITNESS: It's pretty obvious.

THE COURT: Did you observe the crowd do anything?

THE WITNESS: People shouted and complained. They blamed it on me. The cop sort of jumped back and they thought that I was purposely—you know, I was purposely interfering with—

THE COURT: Don't tell me what you think people thought. You observed a crowd reaction?

THE WITNESS: I observed a crowd reaction, which was obviously mixed, a mixed reaction.

THE COURT: All right. Go ahead.

THE WITNESS: I forgot where I was.

THE COURT: Wait for the next question.

Q. Do you recall any other incidents with the police or the Parks Department in the concert of 1983?

(81) A. I think I might just be going over the same ground that Christy already has. They did—you see, we can't be sure who turned off the power, but I think—well, it's just conjecture.

THE COURT: Stop right there. Next question.

Q. Let's go on to the concert in 1984. Do you recall if there were any type of incidents with the Parks Department or the Police Department while you were working the soundboard at the concert?

A. Just basically the same as—the same as it was every year, and the year after that as well, where they just try to talk to me while I am trying to work. We even set up a special person whose job it was to stand next to me and interface with parks people so that I could just do my job.

They would either refuse—they would either just talk to me anyway or—I can't really remember. I remember we had set up a person whose job it was to talk to their person and they would still end up interfering with my job somehow.

Q. How about in 1985? Do you remember any incident at the concert while you were working the soundboard?

A. I remember two police officers ridiculing a Native American folk singer right behind me. As to whether they were trying to affect me, I can't say. But it did (82) affect me.

Q. How about in 1986? Any incidents occur?

A. In 1986 the Parks Department was much less confrontational than they had been in previous years.

Q. I refer your attention to 1984. Did you observe any decibel levels being taken that year?

A. Which Year? I'm sorry.

Q. 1984.

A. 1984? I believe—actually, no. That was in '85. No, I didn't see any equipment or people in 1984.

Q. In 1985 did you observe—

A. I did see people walking around with a decibel meter, but I didn't get close enough to them to have any idea of whether they even had it on or off or what ratings they were obtaining.

Q. Did anybody come over to you and talk to you about the decibel level in 1985?

A. I can't recall exactly. I usually get just a complaint that it's too loud.

Q. Who do you get that complaint from?

A. Numerous people with walkie-talkies. It's never the same person.

Q. Are they members of—

A. The Parks Department. They are either Parks Department officials with a walkie-talkie or they are (83) police, uniformed police.

MR. PINES: Your Honor, could we have a time frame on these questions?

THE COURT: Yes, why don't you sharpen the focus on that.

Q. How about 1985? Were there any complaints by the Parks Department or the New York City Police Department as to the concert, how loud it was?

A. I can't be sure.

Q. How about 1986?

A. There may have been one complaint.

Q. And 1984?

A. I can't be sure of when—of who made which complaint when, in which exact year. I can't be sure enough to really hit it on the head.

Q. Do you ever receive complaints about the levels of sound other than from New York City officials?

A. Yes. I receive numerous complaints from the audience that the sound is not loud enough or that the bass is not—people always have a comment to make whether the bass is too loud or too soft. But the biggest complaint that we get, which I usually get right after I accommodate the Parks Department person by turning it down—okay. What happens is the Parks Department person complains. I turn it down to accommodate them and then 10, 15 people (84) from the audience come up to me one by one over the next half an hour and tell me that I'm ruining the band's set and that it's not loud enough and that they are very disappointed.

THE COURT: And do you do anything in response to that?

THE WITNESS: Basically, I really try to put myself in the position where I don't have the Parks Department coming up to me every half an hour and talking to me and bothering me. So I generally just try to explain to people that the Parks Department has instructed me to turn it down and we don't want them to cut off our power.

Generally they used to threaten that they would cut the power immediately if we didn't turn it down and if it came up again then they would definitely cut the power. And this is in the middle of the concert. So I would be telling people "I'm sorry, I can't turn it up because they will cut the power if I do that." And having to explain that to every person who complains in a crowd of 3000 people is a burden which makes it very hard for me to do my job as an integral part of the performance.

THE COURT: As you sit there today, Mr. Thompson, do you specifically recall at some time a Parks Department official

saying that he would cut off the power if a reduction was not made?

(85) THE WITNESS: I do specifically remember that.

THE COURT: Can you tell me what year that occurred?

THE WITNESS: Actually, it was a police officer and not a Parks Department person.

THE COURT: All right. Can you tell me when that happened?

THE WITNESS: I believe it was 1985.

Q. Do you ever get any input about the sound levels from the bands?

A. Oh, the bands always want it louder, always. The bands never complain that it's too loud.

Q. Earlier in your testimony you spoke about that you were involved in the promotion of the event as well, not only the soundboard, is that correct?

A. That's correct.

Q. Do you recall approximately how many bands and speakers were at the 1985 concert?

A. Somewhere around five to six bands and approximately the same number of speakers.

Q. How many hours, approximately, did the concert run?

A. '85 we're talking?

Q. Yes, in 1985.

A. I could be wrong, but I think it was noon to 6.

(86) Q. Was that an hour that you had agreed upon, that was in your discretion the length that the concert should be, or did you limit the hours for other reasons?

A. We limited the hours for other reasons. In terms of attendance, our group would be a lot better off if we started it later and—

THE COURT: No, that really doesn't respond. The hours were limited for other reasons?

THE WITNESS: Yes.

THE COURT: If you would like me to know what those other reasons were you can put questions?

Q. What were the other reasons?

A. We were told that it had to end at 6 by the Parks Department. And so we made it start earlier so that we could fit all the people that wanted to play. We wanted to get an accurate representation of the culture in New York, which is impossible, we know, but we try to have as broad of a range of cultures available, and so to do that we had to start it earlier, say at noon, when actually there isn't anybody in the park.

Q. Have you ever had to ask a band not to play because of the hours?

A. Yes.

Q. Have you ever had to ask a speaker not to speak because of the limitation of hours? In 1985. Let's keep (87) it there.

A. I believe that more people ask to speak than we can put on, but I can't be specific as to who was turned down.

Q. How about in 1986? Did you have bands that you wanted to put on but could not or speakers that you wanted but you weren't able to because of time constraints?

A. Yes.

Q. Do you recall how many more hours you would like the concert to be or you would have liked the concert to have been, rather, in 1986?

A. I think that the optimum timing would be starting at 1 and ending at 8.

Q. Have you ever discussed the issue of the hours with the Department of Parks?

A. Personally or—

Q. In 1986.

A. I believe in 1986 the person who had filed the permit had not asked for it to go to 8 o'clock and as a result we only got what we had originally asked for. So it wasn't really—it was more an internal problem with us that we didn't go till 8. If we had asked for 8 then we probably would have gotten it—after we sued, of course.

MR. PINES: Object to the response. It calls for speculation.

(88) THE COURT: I will limit the answer to in 1986 they got what in fact they asked for.

Q. How about in 1985? Were there any discussions about hours, what you wanted?

MR. PINES: Object to the form of the question. There is no indication of who we're talking about.

MR. KINIGSTEIN: I will withdraw it. I will rephrase it.

Q. In 1985 were there any discussions between Rock Against Racism and the City of New York concerning the hours of the concert in early May at the bandshell?

THE COURT: You must limit your answer, Mr. Thompson, to what you have personal knowledge of.

THE WITNESS: Right.

A. I can't remember if it was the year when they told us it would be a two-hour concert or if it was the year when they told us that we would have no concert, but it was one of those two things.

Q. You also testified just a little earlier about the promotion, promoting the event itself. You indicated you did some postering. Could you describe what you do, let's say what you did in 1985, to promote the event yourself?

A. I participated in as many events as I could that were non-RAR events but were happening right around—(89) right up until that time. I would basically show up at other people's concerts with posters and hand them out or I would have previously postered the area of the concert or whatever rally or whatever it was. When I have the time I try to organize groups of other people to go out and do outreach through leafleting or postering.

Q. Do you know how much time you usually spend on these activities of promotion?

A. Oh, I—well, I basically spend all my free time trying to promote it at the last minute. I can't be sure of how much time that was. That's your question. I don't know.

Q. You don't have an estimate of hours then?

A. It's hard to really estimate. I just know that when I'm done with all my other responsibilities, then I will do the postering, because no one else—because it seems like no one else is doing it. It's very hard to get people motivated to do that.

THE COURT: But you are a volunteer as far as RAR is concerned?

THE WITNESS: Right.

THE COURT: What is your regular employment, Mr. Thompson?

THE WITNESS: My regular employment is I am a sound reinforcement consultant and I design systems for (90) people who want to put a sound system in a restaurant or a club or an outdoor form, whatever they have, or I will hire myself out to work for another sound company with their equipment, just my expertise.

Q. Mr. Thompson, have you seen the 1986 Naumburg Bandshell regulations?

A. I have glanced at them, yes.

Q. Are you familiar with the part of the regulations which call for a city sound system to be used at the concerts?

A. You mean a city-hired sound system.

Q. I'm sorry. A city-hired sound system, correct.

A. Yes, I am.

Q. Have you seen the sound systems that the city indicated they were using?

A. The four sound systems that they—

Q. Right.

A. Yes.

Q. In your opinion, are those sound systems—

THE COURT: I will accept him as an expert, but I want you to phrase the questions properly. First of all, ask him does he have an opinion as to whether or not there is such and such a proposition, and if he says yes, then you may ask him what that opinion is.

* * *

(98) Q. Do you recall how much money you make at these events and how much has to be borrowed?

A. We generally make somewhere between 500 and 1000 when we do a benefit in a small club and 300 people come.

Q. In 1986, could you just give us the breakdowns for putting on the 1986 Rock Against Racism—

A. That was just about exact, because that's the year I remember the clearest and those are from which I gave you the figures.

Q. So the same as—

A. It's almost the same, yes. The poster thing could vary, but it's almost the same.

THE COURT: Where does your sound equipment come from?

THE WITNESS: The sound equipment is partly owned by myself and it's partly rented, depending on what we—what is deemed necessary.

THE COURT: Is that included in the $350 figure for stage equipment?

THE WITNESS: Yes, it is, correct.

Q. Just on that particular question, in the $350 of rental equipment, is any of that special type of equipment (99) for any type of special effects?

A. I will give it to you exactly. The specific instruments that the musicians request—I mean, not the instruments themselves, but the specific instrument amplifiers.

See, the way we work it is we can't afford to pay the bands. So we set it up as a volunteer thing where—first of all, if they have to bring their own equipment then they have to charge us very—you know, big expenses. So what we do is we rent one setup which they all share, and to do that we have to provide what they need and what they request.

So we have to take the request of the band and if they want a specific keyboard or a specific amplifier or a specific drum set we have to get those things in order to get them to play for no money.

Q. Can you recall in 1986 specific equipment that you had to get for a band?

A. Yes. We had to get an Acoustic 370 bass sound, we had to get a Roland Jazz Chorus guitar amplifier, we had to get a Juno

6 keyboard with a Cerwin Vega amplifier, we had to get a seven piece Tama drum set with Ziljian cymbals.

Q. Do you remember which band that was for?

A. Basically what I try to do is I talk to all the bands, I get all their needs, and I arrange a common stage (100) setup that is agreeable to all of them.

Q. The obtaining of these special—it sounds like some of them are musical instruments.

A. Yes, basically the drum set and the keyboard actually are musical instruments.

Q. And the other items, what are they?

A. The other items are the actual instrument amplifiers.

Q. Are they attached to a soundboard?

A. Yes, they are.

Q. Do you manipulate the dials on those instruments?

A. No, the musicians do.

Q. The musicians do?

A. That's correct.

Q. Tell me, how does it interface, if in any way, with your board?

A. It's connected via a device called a direct box or the amplifier is miked, either—well, that will suffice.

Q. If that equipment was unavailable would the band play?

MR. PINES: Objection, your Honor. Speculation.

THE COURT: No. He may have an opinion. I will permit it.

A. There is no way that a band will play for free (101) unless we provide the equipment, and we can't afford to pay the expenses of every single band. So the answer is if we only had one band, yes. If we want to have a mix of styles, then no.

Q. How many bands did you have in the 1986 concert?

A. I believe it was six.

Q. And how many in your opinion would not have played if you did not have the equipment they requested?

MR. PINES: Your Honor, I have to object. There is no foundation that this witness has in fact that knowledge. He can be asked as to whether they told him specifically whether they would not play, but this is speculation on the state of mind of the willingness of the performers to play.

THE COURT: Well, he has negotiated with the bands.

But in framing your answer, Mr. Thompson, I want you to rely, to the extent it exists, upon what band representatives said to you specifically. If you have no such foundation for answering counsel's question then you should not do so.

I hope that's clear. Do you remember counsel's question?

THE WITNESS: Yes.

THE COURT: You may answer.

(102) A. I am trying to think of a specific band. I believe Johnny Colon Salsa Orchestra. Johnny told me that his band would not be able to play unless we provided a specific list of—in fact, all of the bands only agree to play when I tell them that we are going to provide the equipment that they need. That's just—that's it.

I mean, there is no way to elaborate on that. They won't bring their own stuff unless we pay them big money, and that means up

to $1000 per band. These are all professional bands. This is the way they make their living. The only way I can persuade them to come and play for free is the fact that it's a Rock Against Racism festival, that there will be a lot of people there, and we're setting the whole thing up so they just walk up with their music and their drumsticks and we will have everything for them. That's the only way I can get them to show up.

Q. Let me give you a hypothetical. If you were required to pay $2000 for liability insurance would you have been able to put on the Rock Against Racism concert in 1986?

A. This is a nonrefundable expense?

Q. Right.

A. No, there is no way we could come up with that kind of money.

* * *

(121) Q. Mr. Thompson, if there were no sound regulations applicable to the bandshell would you attempt to limit the upper level of sound generated at the Rock Against Racism event?

A. I would. And if I might elaborate on that. There is a device called a limiter or a compressor which we have and we utilize in our sound system. It's designed to limit peaks and/or compress the program material so that if an unexpected peak should come through, in other words, if someone would drop a microphone against a floor or scream in the mike all of a sudden, this compressor would automatically limit the sound, and I set it just above the operating threshold, so that if anything a little bit louder than my designated program material should attempt to come to the sound system it would automatically be attenuated.

Q. So you acknowledge that there is a level beyond which sound amplification would be unreasonably loud for the bandshell?

MR. KINIGSTEIN: Objection.

THE COURT: Sustained.

Q. Given the fact that you do limit the sound that is emitted from the performances of RAR at the bandshell, do you recognize that there might be a sound level that's unreasonable for that area?

(122) MR. KINIGSTEIN: Objection.

THE COURT: I will let him answer that.

A. I think a volume that would cause people's ears to bleed would be too loud.

MS. LIBERATORE: Your Honor, may I have the answer stricken? It's not responsive to the question.

THE COURT: The question was not quite that precise. He is answering in his own way. I will let it stand.

Q. So you're saying that nothing less than that level would be unreasonably loud?

A. Not really. I would say that a painfully loud—if it was painfully loud that would be unreasonably loud.

Q. So then your only disagreement with the Parks Department is as to what level should be set for the bandshell area?

MR. KINIGSTEIN: Objection.

MS. LIBERATORE: He has established that he believes there is a level beyond which there should not be a performance.

THE COURT: I think it would be more helpful to me if you would direct his particular attention to a particular regulation and then ask questions on the basis of that. Read him what you have in mind from the regulations.

(123) MS. LIBERATORE: I withdraw the question.

THE COURT: All right.

Q. Isn't it true that you rented a sound mixing board for the 1981 Rock Against Racism event at the bandshell?

A. We rented—we subcontracted the entire job to a company called Three R Sound in Brooklyn.

THE COURT: This was 19?

THE WITNESS: '81.

Q. So it's your testimony that you rented the services of a sound engineer to run the soundboard in 1981?

A. That's correct.

Q. Isn't it your testimony that there isn't anyone in Central Park at noon on a Sunday, on a sunny weekend day in May?

MR. KINIGSTEIN: Objection, your Honor.

THE COURT: He certainly said nothing like that now.

Q. If I can draw your attention to the testimony you gave yesterday, you said there is no one in the park at noon, is that correct?

THE COURT: I will let the witness deal with it.

A. I did say that. What I meant was—when I said no one, I meant people who have come for our concert. The park does have other people in the park at that time.

(124) Q. Isn't it also true that you said that the audience that you seek to reach is best reached after 1 o'clock in the afternoon?

A. That's the point I was making, yes.

Q. Isn't it true that RAR was permitted to hold its event from noon to 7 p.m. last year?

A. I believe so.

Q. Isn't it also true that you arrived at the park at 6 a.m. to set up for a noon concert?

A. That's correct.

Q. Was that in agreement with the Parks Department?

A. To the best of my knowledge.

Q. Is it your testimony that there is one knob that controls master volume on the soundboard that you pointed out to the police? Was it your testimony yesterday that you pointed out a knob on the soundboard that was a master of sound volume knob to a police officer?

A. In 1983.

Q. There is no such knob now, is that what your testimony is?

A. I was just about to say that different mixing boards are configured differently and not all have this master control. That particular year we had an extremely simple and user-friendly device which did have a master volume controller on it.

(125) Q. So now there is no simple way on your soundboard, the way it's configured today, to control the volume?

A. No, I don't mean to say that. It's just as simple, but it's not quite—it's just a different board.

Q. Is there more than one knob now?

A. There is more than one knob, yes.

Q. How many knobs are there?

A. I would say—in just the mixing board or the outboard equipment included?

Q. Just leave it at the mixing board.

A. What's 22 times 8?

Q. There are 22 times 8 knobs to control just volume.

A. 22 times 8 times—I would say 22 times 8 plus 30. If you can do that, that would be—

Q. That's how many control just the volume?

A. Just the volume? Yes, just the volume.

Q. So then there is no simple way to control the volume on your soundboard if you have to touch 22 times 8 knobs plus 30?

A. No, there is a simple way to instantly attenuate the volume.

Q. Which is?

A. Which is the master volume sliders.

Q. So now there is a master volume slider and not a (126) knob?

A. Correct.

Q. And you can touch that at a moment's notice, you don't have to touch 24 other knobs?

A. That's correct.

Q. It's just a sliding dial type of instrument?

A. That's right.

Q. And there is only one of those?

A. One of those for each send to each speaker array.

Q. How many does that come to total?

A. Well, there is a short throw section for the mains, which is the audience, there is a long throw section, which is the audience standing behind the people who are standing in front of the

stage, and then there are the monitor sends, which would be side fills, and the floor wedge sends, which can be individualized if necessary. So it could be up to eight with our particular board.

Q. So then it's your testimony that there are eight knobs that control—we will call them sliding dials, if you wish—that control the volume?

A. You're primarily concerned with the volume that reaches the audience. So I would say there are two knobs for that currently.

Q. Very well. Isn't it also your testimony there are 200 to 300 knobs to be adjusted in generating the (127) particular sound you want aside from the master volume control knobs?

A. That would be close enough.

Q. Are you at all familiar with the sound company New York Sound?

A. No.

MR. KINIGSTEIN: Objection, your Honor.

THE COURT: I am not quite sure where counsel is going, but I will let the witness answer.

A. No.

Q. So then you have no way of knowing what quality equipment they provide at any performance?

A. I would say that would be true. A list of equipment doesn't tell you anything about the quality of how it's interconnected.

Q. That's not my question. My question is—

A. But it could malfunction easily if it was interconnected improperly. A list of equipment doesn't tell you how professional it is.

MS. LIBERATORE: Your Honor, that's not responsive to my question.

THE COURT: Put your question again.

Q. My question is, are you at all familiar with the quality of equipment—

A. Of New York Sound?

(128) Q. —of New York Sound?

A. No.

Q. Thank you. Have you ever attended an event at the bandshell in 1986 at which New York Sound provided sound for that event?

A. No.

Q. So then you have no way of knowing how they produce an event, do you?

A. That's correct.

MS. LIBERATORE: Could I have a moment, your Honor?

THE COURT: Yes.

(Pause)

Q. Isn't it true that in each year that Rock Against Racism had an event at the bandshell that the cleanup bond was refunded to Rock Against Racism?

A. You're talking about 1986?

Q. I am talking about every event that you are familiar with.

A. Within six months.

Q. It was refunded?

A. Within six months.

* * *

Transcript of Proceedings on March 23-25, 27, 30, 31 and April 1, 1987

Testimony of William Dalton, Witness on Behalf of Defendants

(298) WILLIAM DALTON,

called as a witness by the plaintiff, having been duly sworn, testified as follcws:

THE COURT: I think in fairness, Mr. Pines, I should say to you I appreciate the defendants coming in with a witness now, taking the witness out of the ordinary order of proof, and I will hear him without prejudice to the defendants' right to argue as a matter of law that at the conclusion of the plaintiff's evidence there was no case to answer.

MR. PINES: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. PINES:

Q. Mr. Dalton, can you tell me what your current position is in the City of New York?

A. I am chief of Urban Parks Service for the New York City Parks Department.

Q. Are you an actual employee of the Department of (299) Parks and Recreation?

A. No, I am paid by the New York City Police Department.

Q. What is your rank in the New York City Police Department?

A. I am a sergeant, New York City Police Department.

Q. Would it be fair to say you're on loan then to the Parks Department from the New York City Police Department?

A. That's correct.

Q. What are your responsibilities in the Department of Parks and Recreation?

A. I oversee the operations of the Parks Enforcement Patrol, the Urban Park Rangers and the communications division for the Parks Department.

Q. What is the Park Enforcement Patrol, please?

A. Park Enforcement Patrol are peace officers deputized by the New York City Police Department who enforce the park rules and regulations along with the laws and regulations of the city and State of New York.

THE COURT: You say they are deputized by the NYPD?

THE WITNESS: Yes, sir.

THE COURT: Are they police officers?

THE WITNESS: They are peace officers, sir.

(300) THE COURT: What's the difference between a peace officer and a police officer?

THE WITNESS: A quick definition would be that a police officer has the power to be a police officer 24 hours a day, a peace officer has the power while he is working. There is a search and seizure, stop, question and frisk difference also. But those are the only two differences. They are also unarmed, sir.

THE COURT: Is a peace officer an employee of the city on a full-time basis?

THE WITNESS: Yes, sir.

THE COURT: Okay. Thank You.

Q. Is it fair to say—you call them PEP officers, do you not, the Department of Enforcement Patrol?

A. That's correct.

Q. —that the PEP officers have the power of arrest?

A. That's correct.

Q. How long have you been with the New York City Police Department?

A. At this point, I have 17 years, a few months.

Q. And how long have you been—

A. I'm sorry. Let me correct that. Eighteen years and a few months. I will have 19 years in June.

Q. In June?

(301) A. Yes.

Q. How long have you been with the Department of Parks and Recreation?

A. Since 1981.

Q. Have you had any responsibilities in connection with the Rock Against Racism concerts from 1983 through to 1986?

A. Yes, I have.

Q. Have you been on-site during those events?

A. Yes, I have.

Q. At each of the events from 1983 through '86?

A. That's correct.

Q. Has your responsibility been the same for each of these concerts?

A. Yes, it has.

Q. Can you describe what that responsibility is?

A. Represent the Parks Department at these events, sometimes as the senior person, sometimes not, and to direct the security and the safety—and protect the safety of people at events throughout the park.

Q. When you say the safety of people at events, does that include both audience and RAR performers and sponsors?

A. Everybody. That's correct.

Q. Let me direct your attention to the RAR concert in 1986. Is it correct you were on-site at that event?

A. That's correct.

Q. Were any other events going on in the park, special events, in 1986?

A. The Cerebral Palsy Bikethon takes place the same day.

Q. Was RAR your primary concern on that day?

A. No, it wasn't. The Cerebral Palsy Bikethon was our primary concern that day. We have about 2000 young riders who are riding around the park for money, to raise money for cerebral palsy, and most of our efforts are in the protection of those riders, so cars don't come in the park or they don't collide.

Q. Do you know approximately how many people attended the RAR event in 1986?

A. I can tell you approximately. Less than a thousand.

Q. Was that based upon you personal observation?

A. On my personal observation.

Q. Do you know whether there were any complaints about sound levels received by you or anyone with whom you worked in connection with the 1986 RAR event?

A. Yes, there were complaints.

Q. Do you have any recollection specifically about the exact addresses from which these complaints were received?

A. Most of them from the west side of the park. I remember One Lincoln Plaza, or up in that area. It was so far away from the park I was surprised to hear the address.

Q. Are you speaking about Lincoln Plaza?

A. There was one address that was a few blocks away from—most of the complaints would come in with Central Park West addresses or on side streets. This one was quite always up.

* * *

(314) Q. You testified you have been present at the RAR events over a period of several years, from at least 1983 on, is that correct?

A. That's correct.

Q. During your involvement on-site at these events have you ever been aware of any disputes between either park officials or police officers and RAR sponsors with respect to sound level?

A. Yes.

Q. Can you describe any of those incidents?

A. I can recall the Police Department asking a representative of RAR to turn the sound down and the person from RAR objecting.

(315) Q. Do you know who that person was?

A. Yes, I do.

Q. Who was that?

A. I believe his name is Dean Tuckerman.

Q. Can you describe to the best of your recollection the nature of the discussion on the issue of sound?

THE COURT: Can we fix the year?

Q. Is it possible you have a specific recollection of the year?

A. I can't give you a specific year. I'm sorry.

Q. Do you know whether Dean Tuckerman was involved with RAR on-site in 1986?

A. I don't recall seeing him in '86.

Q. So that it's your belief that this incident did not occur in '86.

A. It did not occur in '86.

Q. Let me ask you this: Did these disputes occur over more than one year or only one year, to your recollection?

A. Two years, I would say.

Q. Between 1983 and 19—

MR. KINIGSTEIN: Objection, your Honor.

THE COURT: Yes. Rephrase it.

MR. PINES: I'm sorry.

(316) Q. Does your experience go back beyond 1983?

A. Yes, it does.

Q. To what year?

A. 1981.

Q. Can you limit it at all between 1981 and 1985?

A. I have to say they all come together in my head. I can't separate them.

Q. But it is your best recollection that it occurred—is it two occasions?

A. Two occasions.

Q. Could it have been more or is it—

MR. KINIGSTEIN: Objection, you Honor.

THE COURT: Sustained.

Q. Just describe the nature of the discussion on the sound level to the best of your recollection.

A. I recall a senior member of the Police Department on the scene at the time requesting Mr. Tuckerman to have the sound turned down and Mr. Tuckerman objecting to that.

Q. Did he in fact turn the sound down?

A. At times the sound was turned down, at times it wasn't.

Q. Can you be more specific about that?

A. It was an ongoing request by the Police Department because the sound levels would change constantly (317) during the day.

Q. When the Police Department requested Mr. Tuckerman to turn down the sound would he do so at that point?

MR. KINIGSTEIN: Objection, your Honor.

THE COURT: To the extent that the witness was in a position to observe what Mr. Tuckerman did, he may describe it to me.

MR. PINES: Let me rephrase the question.

Q. I understand you can't specifically say what year you're speaking about. Are you, however, referring to a specific incident?

A. Yes, I am.

Q. Regardless of the particular year, I am asking you about that incident, to focus on the specific incident that you now have

in mind, when you testified the police told Mr. Tuckerman to turn the sound down.

MR. KINIGSTEIN: Your Honor, I don't know what year we're talking about here. I know it's somewhere between '81 and '85.

THE COURT: Yes.

MR. KINIGSTEIN: I think to continue with this line of questioning we should know at least is it '81, '82 or some frame of reference here.

THE COURT: Would you like counsel to put some (318) leading questions to the witness in the possibility of sharpening the focus? He has given his best present recollection, I think.

MR. KINIGSTEIN: All right. I will allow some leading questions to establish the year.

THE COURT: You may lead if you like, Mr. Pines.

MR. PINES: Thank you.

Q. I will try to help you fix this in time subsequently. What I would like to do, however, is to simply continue with your narrative with respect to this particular incident, if we might.

When the Police Department asked Mr. Tuckerman to turn the sound down is it your recollection that he did so or that he did not do so every time he was requested to do so?

MR. KINIGSTEIN: You Honor, I object. I agree to leading questions to establish the year. I would still like to know what year. I agreed to leading questions for that purpose.

THE COURT: Counsel asked if he turned it down or not. That is not a leading question. I will take the answer.

A. There were times when Mr. Tuckerman would object but have the sound turned down, either himself or have somebody

turn it down, and at times he would have to be (319) asked a few times by the police, who would—he would ultimately go over and have it turned down, and there were times when it wasn't turned down.

Q. Did you have occasion to view the actual mixing board during this event, during this incident you're talking about?

A. I know of the mixing board, yes.

Q. And could you see what Mr. Tuckerman would do when the request would be made or was made during this incident?

A. No, I couldn't.

Q. Subsequent to his turning the sound down did you observe the sound levels rising again?

A. Yes, I did.

Q. Would the issue arise again, did the police speak to Mr. Tuckerman again about the incident?

A. That's correct.

Q. Did this repeat more than once; in other words, a request, the sound being turned down, the sound going back up again and the request being made again?

A. That was a constant scenario, yes.

Q. And is it this pattern—

THE COURT: No, we are leading now.

Q. Did this occur in more than one year?

A. Yes, it did.

(320) Q. Directing your attention to 1986, do you know whether either police officers or PEP officers prohibited the distribution of leaflets during the RAR event?

MR. FOSBINDER: Objection.

THE COURT: The witness may answer on the basis of his own observations.

A. I don't know of anybody stopping anybody from distributing leaflets or literature.

Q. Do you know whether any officers, police officers or PEP officers, prohibited—

MR. FOSBINDER: Objection to the form of the question. He can't possibly know whether or not they did something. He can only have knowledge of someone doing something.

THE COURT: Recast it in terms of his own observations.

Q. Did you observe any police officer or PEP officer in the act of prohibiting banners being displayed at the RAR event?

A. No, I don't recall that.

Q. Do you know whether banners were prohibited by officers under your command at the 1986 event?

A. We have rules for all events and banners that we go along with. Of course, somebody could have said something to somebody regarding a banner.

(321) MR. KINIGSTEIN: Objection, your Honor. It's not responsive to the question.

THE COURT: Well, what someone could have done is not probative of anything. I don't know what the rules about banners means or whether this witness is in a position to say that any instructions were given consistent with those rules on this occasion. Counsel may wish to pursue that further.

Q. When you said "We have rules," what did those rules provide with respect to banners in 1986?

A. During the time of preparing a special events permit and the negotiations that go on prior to a special event the Park

Department requests to see all banners that will be displayed, and we allow numbers of banners, so that we don't end up with—if I could refer to like the Tour De France, you know, the advertisements all over, we certainly don't want that type of, you know, infringement on everybody else's events, let's say. To tack things up on trees would be something that we would look—we would not allow anybody to put a nail in a tree. They could tie something on a tree. As a matter of fact, that I know did happen because I did talk to somebody about where they were attaching something to a tree.

Q. This is in 1986?

A. 1986.

(322) Q. And that was permitted?

A. I believe we let them hang it on a barrier, a French barrier, a metal barrier that was around a tree.

Q. So is it fair to say then that banners were permitted in 1986 at the RAR event?

A. Oh, yes, they were permitted, sure.

Q. Do you know personally whether anyone who sold T-shirts at the RAR event was directed by police officers or anyone under your command not to do so?

A. Not at all. I observed people selling T-shirts or giving out literature. That was just happening. We knew it.

Q. To your personal knowledge, do you know whether anyone sold food at the 1986 RAR event?

A. There was one group, and I believe it was the same group that had the banner—I don't recall exactly what it was; something about Indian Nations maybe—who started out selling food. We told them that it was against regulations to sell without a concessions permit and a Board of Health license. We said "Of course, you can distribute food, you know. You can't sell it." And

they continued giving out the food throughout the day but we didn't see them sell it any more after we told them that.

Q. Are you familiar with the laws of New York City regarding the sale of food in parks?

(323) A. Yes.

Q. Do those laws permit you to close down vendors of food in the park?

A. Yes, to confiscate and summons.

Q. Could you have in fact confiscated and issued a summons to the persons who was selling the food?

THE COURT: Is this really a part of this case, Mr. Pines?

MR. PINES: Yes, your Honor, I believe that it is. To the extent that the plaintiffs have suggested that there is some animus specifically directed toward RAR, I believe it is very much probative of the lengths to which the Parks Department has in fact—

THE COURT: All right. Save the argument. Put the question.

Q. Could you in fact have issued a summons and confiscated the food?

A. Yes, we could have.

Q. But you did not?

A. We didn't, no.

Q. Do you have any opinion about RAR personally?

A. Another event.

Q. It has no special significance to you?

A. No, none at all.

Q. Are you offended by their music?

A. I have a 17-year-old and a 20-year-old daughter. It's hard to offend me with the music.

THE COURT: At least, it's fair to say you're used to it.

Q. Do you find the message of RAR, aside from the music, offensive?

A. Not at all. There were things of my personal opinion that were very worthwhile and I agree with and that's fine.

Q. Are you in any way displeased that RAR held an event in 1986?

A. No, not at all.

MR. PINES: I have no further questions.

CROSS-EXAMINATION

BY MR. FOSBINDER:

Q. Could you clarify for me your responsibility once again over the PEP officers? I didn't quite follow that. You're in charge of them, is that it?

A. Over the years my title has changed and every year I may have played a different role over the PEP officers. But I was usually in charge of the PEP officers at the event.

Q. Was this true in 1985 and '86? You were there?

A. 1985 I was not at the event full time. There were others there that would take on the normal supervision (325) duties, whatever has to be done.

Q. So it's possible that any of these things that were claimed to have been done could have happened while you weren't there in 1985?

A. Yes, it's possible.

Q. PEP officers have the authority to issue a summons, is that correct?

A. That's correct.

Q. And they can only issue a summons or threaten to issue a summons if someone is violating a statute, a law, or a rule which has the force of law, is that correct?

A. If somebody is in violation?

Q. Let me rephrase that. Would it be improper for a PEP officer to threaten someone with arrest if they weren't violating a law?

A. I guess it depends on the circumstances. We will use warning summonses, if you want to call that threatening, in general, distribute literature in a park. An example is a playground, where there are no dogs allowed in a playground, and the sign was just put up.

Q. Is there a law that says there are no dogs allowed in a playground?

A. Yes, there is a law. When there was a sign up that said dogs must be on a leash, we would change the sign, we would issue warnings to the people who are walking their (326) dogs, so that they don't end up getting a summons and saying that they didn't know anything about the law.

Q. It would be wrong for a PEP officer to walk up to someone and threaten to arrest them if they weren't observed violating a law, isn't that true?

A. I would guess, from the way you describe it, you're right. I would have to know the specifics of what you're talking about.

Q. Can you tell me where you find the law that the PEP officers are allowed to enforce, what specific criminal code, civil code, what—

A. PEP officers enforce all the laws of the State of New York, all the laws of the City of New York, health, sanitation, Parks Department rules and regulations, virtually everything. I

don't know about fish and game laws. I think that's the only thing that we need an outsider for.

Q. Have PEP officers confiscated radios and boom boxes in the so-called quiet zone in Sheep Meadow?

A. Yes, they have.

Q. Could you give me some idea of what law those people were breaking?

MR. PINES: Your Honor, I object on the grounds of relevance.

THE COURT: Sustained.

(327) MR. FOSBINDER: The Sheep Meadow has come up repeatedly as a so-called quiet zone and the city has, I think it's fair to say, implied that there is some sort of law or regulation that governs the conduct of Sheep Meadow and that they were somehow infringing upon that area.

THE COURT: I am not concerned with arrests for this kind of box, Mr. Fosbinder. I sustain the objection on the ground of relevance.

Q. With regard to the complaints that you previously testified about, do you have any knowledge as to whether the person taking the complaint asked the complainant whether or not they were present in the park when they heard the noise or whether they were at home when they heard the noise, the sound?

A. No, I don't.

Q. Do you have any idea whether they asked the person who complained whether they objected to the content or whether they objected to the perceived loudness of the event?

A. No, I don't.

Q. Do you know how many complaints were received total regarding noise generated in Central Park in 1985?

A. No, I don't.

Q. Do you have any idea of how many were received total in 1986?

(328) A. I'm sorry. I don't.

Q. Do you have any idea whether the number of complaints received on the Sunday of the RAR event in total regarding noise from the park was disproportionate to any other Sunday?

A. I can't say that it is. I believe it is.

Q. What do you base that belief upon?

A. Because we received complaints that are notable. We don't really receive too may complaints for anybody else. Roadrunners doing their announcements seem to be the once that we get complaints about. We have to make them turn their speakers around or turn the volume down.

Q. Could you tell me what sort of sound system is specifically used for the roadrunning events?

MR. PINES: Your Honor, I object on the grounds of relevance.

THE COURT: No, in the context of noise complaints I will let him answer.

A. It varies according to event.

Q. So you don't know whether those sound systems are a tenth as powerful or ten times as powerful as the RAR system?

A. No, I don't.

Q. Were you involved in any way in the permit procedure for RAR's permit application in 1985?

(329) MR. PINES: Objection, your Honor. Beyond the scope of direct.

THE COURT: Well, yes. But I will permit him to extend the scope subject to further inquiry.

A. No, I had nothing to do with the permit.

MR. FOSBINDER: If I could have just a moment.

THE COURT: Yes.

(Pause)

BY MR. FOSBINDER:

Q. You spoke about officers requesting RAR to turn down the sound at various times. To the best of your recollection, was that phrased as a friendly request or was it implied that a summons would be issued if they didn't turn it down?

A. I would say that it was an indication that they were in violation or they were exceeding the sound limits.

Q. What rule or law were they violating?

A. I can't tell you specifically the regulation.

Q. Are you familiar with the Naumburg Bandshell regulations?

A. I have seen them, yes.

Q. The copy that you are familiar with, did that copy in 1986 include a provisions that stated no banners and no distribution of literature?

A. I don't recall.

(330) MR. FOSBINDER: May I approach the witness?

THE COURT: Yes.

Q. Could you identify for the record what you're looking at?

A. Document number 86-7389, United States Court of Appeals—

Q. It's open to what section? What is that?

MR. PINES: Your Honor, I object on the grounds of relevance. This witness has indicated only a vague familiarity. His testimony about—

THE COURT: I understand his testimony. This may refresh his recollection. I will permit it.

Why don't you simply state for the record, Mr. Fosbinder, what you put before the witness.

MR. FOSBINDER: I put before the witness a copy of the Naumburg Bandshell regulations as found in the appendix of the exhibit.

THE COURT: Just so.

Q. Is it part of your duties to be familiar with all the laws and regulations which the officers under you enforce in Central Park?

A. I try to be.

Q. Can you explain to me why these regulations weren't in force, if, as you say, they weren't?

A. We try to use discretion as much as we can so (331) that we don't cause problems when not necessary.

Q. Thank you. Can you tell me, in 1983 were you present when the concert of event ended?

A. I couldn't tell you in 1983 if I was—

Q. Do you have any recollection of police officers pulling the plug in 1983 or 1984 on the sound system?

A. I do recall the police officers pulling the plug, as you say, but I don't—

Q. Did that occur before or after the time on the permit ended?

A. After. Any time that I was there, it was always after the time indicated on the permit.

MR. FOSBINDER: That's all.

THE COURT: All right.

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Transcript of Proceedings on March 23-25, 27, 30, 31 and April 1, 1987

Testimony of Gary Floyd, Witness on Behalf of Defendants

(336) GARY FLOYD,

called as a witness by the defendants, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PINES:

Q. Mr. Floyd, are you currently employed?

A. Yes, I am.

Q. Can you describe how you're employed?

A. Yes. I work as a consultant and as a designer, running essentially a self-employed practice, advising a number of clients in regard of performance and theatrical type events and their needs for sound, for lighting, for staging, as well as the production aspects.

Q. Can you describe your experience in that area?

A. Well, I have approximately 17 years background from the first time I started working in this area. I have a master's degree in the theater arts area, with (337) specialties in design, and also worked as a recording engineer.

I have worked for a number of different companies over the years. I have spent a number of years working for the Smithsonian Institution as far as staff member, and I have also worked for a number of universities.

Q. Can I ask you what work you did in connection with the Smithsonian Institution?

A. Yes. I was in charge of site planning and technical coordination, including audio for all the Smithsonian's festival American Folk Life events on the National Mall. I also worked with the inaugural events as far as providing the staging and sound activities for the concerns that took place both indoors and outdoors.

Q. Can you continue with your employment history?

A. Let's see. Would you like a resume listing?

Q. Did you work for the State of North Carolina?

A. Yes, I have. I have worked for the State of North Carolina on several occasions.

Q. Can you describe—

A. Most recently, last fall, working as production manager and associate producer. The events I worked on at that time were for something called The Year Of The Native American.

Prior to that time I worked for the state's (338) Department of Cultural Resources, producing the state's 400th anniversary events at Manteo, North Carolina. These involved sound staging, design. We set up a number of staging areas for such dignitaries as Princess Anne, Walter Cronkite. We had close to half million visitors in that geographic area for a one-week period. We provided audio reinforcement to multiple locations. I was in charge of selecting the audio type—let me rephrase that. The audio firm to be hired and contracted with provides such work. I was in charge of the quality control for all of that.

Q. Can you describe the outdoor sites you worked at in connection with you employment for the State of North Carolina?

A. Well, when you say sites, are you referring to the work sites?

Q. Yes.

A. Okay. I was based out of Raleigh. We worked events in Raleigh—

Q. Let me stop you and possibly direct your attention. In terms of outdoor sites at which you staged events, can you describe some of those?

A. Okay. We were principally involved in siting outdoor events. Some of these involved multiple staging. For instance, we did some events at Duke University, used (339) the entire university campus. We provided stages that had back-to-back siting, we had stages that were facing each other. We even worked with the entire stadium there. We even had some proposals up to the point of doing major rock and roll concerts for 50,000 stages as small as, you know, 50 people with a single performer. All of these were typical of the types of sites and of the events we did throughout the state.

Q. In connection with your employment as you have described it, were you called upon to evaluate the sound systems, a variety of sound systems to be used?

A. Yes, we—in fact, most of the companies that I was involved with were the ones that came to my attention because of interest in the work the state was doing, and so we had a large number to sort out. I was responsible for making those decisions and sorting out which inventories looked adequate for a given site, which inventories would meet the needs that we had from the performers. We also had a number of companies that we had to work out contractual arrangements with as far a residuals, TV rights, that sort of thing.

Q. Did your employers rely upon your opinion with respect to the relative qualification of different sound amplification provided?

A. Almost implicitly.

(340) Q. Directing your attention now to the events of this litigation, can you recall the first time you had any contact with Joseph Killian?

A. Yes, I can. I was introduced to Joe at a meeting where I was actually working with another group that was meeting with Joe in regard to the use of the bandshell site.

Q. Did this meeting have anything to do with the consideration of various firms to provide sound for the bandshell?

A. No, at that time, my first meeting, that did not, but it—

Q. That's fine. We will get to that in time.

A. Okay.

Q. When was this, if you recall?

A. This was approximately January of last year.

Q. 1986?

A. Right.

Q. At that time did you speak with Mr. Killian about the possibility of reviewing different sound systems for the bandshell?

A. No, I did not. He had asked me a few questions about sound systems and sound companies at that time, but that was the limits of I think our conversation at that time.

(341) Q. When was the next time you had contact with Mr. Killian?

A. I think it was approximately three, four weeks later I had heard from Mr. Killian, because he wanted to know if I might be

of some assistance to him in reviewing a number of proposals he had in regard to sound for the summer. At that time he was trying to sort out, you know, just exactly what the companies had sent.

Q. Can you describe specifically what Mr. Killian asked you to do for him?

A. Well, at that time he was trying to determine what the requirements would be, and so I proposed to him that I would try to evaluate the types of groups that he would have during the summer programming and would try to assess what the needs would be to come up with a list of specifications to be provided through any sound company that wished to bid on the proposal.

We also discussed providing a questionnaire so he could get better information to the particular group's needs. We talked about a number of details with the stage itself, stage flooring. You know, there was a number of ancillary items to the actual sound company.

From that conversation we then drew up a letter of agreement as to what services would be provided and on that basis I then gave him written documentation, I (342) solicited additional bids from sound companies that were from New Jersey, Connecticut, New York here, and, of course, Long Island.

Q. Hold up for a second. Were you at that time employed by the Department of Parks and Recreation?

A. No. I was only engaged by them as a consultant. I was never an employee.

Q. Were you or are you now an employee of either the Department of Parks and Recreation or the City of New York?

A. No, I am not.

Q. Did Mr. Killian indicate to you whether he considered that in his decision to use you?

A. Well, at the first conversation I think he thought I was a sound company looking to try and make an inroad into his office

for employment of my company, if I had such a company. He looked upon my independence as an asset, to be able to be a neutral person in the selection of whatever company.

One of the key considerations I think at the time had been that he was looking to produce the best possible season since it was his first season under his administration of the program. The idea was that he wanted to get the best possible sound company, you know, for the site.

(343) Q. Do I understand you correctly that as far as you were aware, he thought initially you might be pushing your own company and that was in fact not the case?

A. Yes. That was his initial impression, that I was just another one of the companies that might have been retained by the group that I had first been working with.

Q. And were you in fact affiliated with that group or any other sound provider, sound amplification provider?

A. No. I tend to—I mentioned before I tend to be an independent producer and work with other groups in producing their events. If the group has a good idea and needs to get it up on stage, as far as the technical details, whether it's the lighting, the audio, the stage itself, that's generally the areas that, you know, I address as far as client needs.

Q. You spoke earlier of a questionnaire. I take it that's a questionnaire that would go out to the sponsors of events?

A. It generally goes out to each group or performer to try and ascertain what the needs of that group or performer might be ahead of time. This information is then used in order to provide the electrical information for hookups, it is also forwarded to your sound contractor in order to provide the sound contractor with what the needs will. That gives everyone lead time in order to come up (344) to the given performance date with what you need to do the job.

Q. In advance of the performance?

A. Of course.

Q. Is the use of this questionnaire in your experience unique to the bandshell or have you used it in other contexts?

A. Well, I have developed a number of questionnaires over the years, generally more site specific. Most people have particular facilities that limit or enhance, you know, the ability of a group. For instance, how do you load in, where do you park? These are things that generally you put down on those forms in order to help the performers as well, in order to tell the performers additional information.

Most of what you're looking for is the information back from the performer. If the performer provides you with the number of performers, the technicians they can provide, the number of microphones that they might need, special equipment requests, all these are part of the answers that you're looking for an such a questionnaire.

Q. Forgive me for asking the question, but would the purpose of this questionnaire be to harass the performers in any way?

A. No. It's almost an industry standard. You can (345) look at almost identical information on any form created by any particular performance hall.

Q. Returning now to the chronology of your work with Mr. Killian and for Mr. Killian, can you tell me what you did when he requested that you provide the requirements upon which the various sound amplification firms could bid?

A. Well, most of our work was in generating the information. Joe actually created the final form, and he used information and a sample form that I provided to him for that purpose.

At that time we discussed whether or not I would create an actual form for him that was very specific and do that, you know,

for the parks. But he felt at that time his office should be the final authority on that request form.

Q. Did there come a time when the request form resulted in proposals being made to the department, to your knowledge?

A. This is more for the performers. It's not so much for the sound company, as far as soliciting bids or information from the sound company. What was generated was a list of minimum requirements for soliciting bids, i.e., when we were in discussion with a given company we would give them a minimum list, so there is a standard by which all the companies would bid against.

(346) THE COURT: And by companies you're talking now about sound companies?

THE WITNESS: That is correct.

THE COURT: Who Mr. Killian was considering possibly as a sound contractor to service the bandshell, true?

THE WITNESS: That is correct.

THE COURT: Fine. Okay.

Q. Do you recall how many firms submitted proposals?

A. We had a review of approximately 16 firms. When I say we, let me clarify that. I have a colleague that works with me who has approximately 20 years experience in audio engineering and he provides very detailed information regarding to the theory and practice as far as what we would call the more esoteric aspects of the business.

Q. And you reviewed the bids, the proposals submitted by these 16 firms?

A. Yes, we did.

MR. PINES: I would like to have marked as Defendants' Exhibit C a two-page document.

Q. Did there come a time when you summarized the proposals in a tabular form?

A. Yes, we did. I produced for him a final document. We had tied to sort them out to come up with a list of companies that did satisfy the minimum requirements. (347) In a number of cases we found companies that would provide more and exceeded the requirements by quite a bit.

Q. I show you what has been marked Defendants' Exhibit C for identification and ask you if you can identify the document.

A. Yes. This is the document that we produced for Mr. Killian.

Q. Can you briefly summarize for us what is contained on this table?

A. Well, in reviewing most of the documents that came in, the bids, we found that some of them were written up in different forms. We found that some were in the form of a letter saying that they would, in a very friendly sort of way, provide wonderful sound for a given, you know, event. Some companies provided an inventory and on the inventory sometimes it said mikes provided. There was a lack of any real clear distinction or uniformity on a number of the initial bids. That was one of the problems that Mr. Killian had in trying to sort out what was being offered.

The reason that it came out in tabular form was trying to provide a comparison study of what these major companies here were offering at that time. We came up with essentially the standard format of the company name, then a listing of the equipment.

(348) The equipment listings are broken down into the input type devices, which are microphones and something known as a direct box, which allows instruments to be connected to the sound system. We also looked at the mixers and tried to evaluate mixers

side by side, amplifiers, speakers. We also noted some of the particular bits of information we had gathered in the process.

There was also at the time of the bids a proposed pricing that was offered as a contract. This was done on this sheet for our comparison to get an actual, you know, chance to say, well, this company is offering X amount of inventory and perhaps ability for a given price. This gave us some sort of feeling in the evaluation.

In trying to decide on the final listing we only proposed a recommendation to Mr. Killian at the time. As such, the final pricing, I really cannot be specific if this was what was determined, because that's a difficult area as far as this —what I mean by that, this is spread out over an entire season. This is not, you know, very specific. If I wanted something for Saturday night I would think this would not be the same pricing structure I would look at for a single weekend event.

Q. An actual per event cost might be higher?

A. Generally I would expect it to be, because most of the pricing that we discussed for most of the firms was (349) based upon a block contract of say 45 to 60 events.

Q. For example, in the last column on the right I notice there is a proposed event price per and then 45 and 60. Does that per price, to your knowledge, correspond to an actual per event price or is it a reflection of an assumption made of the seasonal price divided by a certain number of events?

THE COURT: If we are about to start considering the contents of this document, Mr. Pines, it must be in evidence.

MR. PINES: I am sorry. I would like to move this into evidence.

THE COURT: Is there objection to the offer?

MR. KINIGSTEIN: No.

THE COURT: I receive it. Exhibit C received.

(Defendants' Exhibit C for identification was received in evidence)

THE COURT: Before counsel takes you further into it, can you tell me approximately on what date you forwarded this document to Mr. Killian?

THE WITNESS: I have a cover letter that was sent with this, that was part of this document originally. My recollection at the time, the cover letter with this I think took place approximately April—

THE COURT: Would it refresh you recollection (350) to look at the covering letter?

THE WITNESS: I think I might have that in my file, yes.

THE COURT: I would be interested in that, I think. Why don't you see if you can refresh you recollection on the point.

(Pause)

THE COURT: Can you tell me now, Mr. Floyd, when that document, Exhibit C, was sent to Mr. Killian?

THE WITNESS: Yes. This was done April 28, 1986.

THE COURT: All right.

BY MR. PINES:

Q. Mr. Floyd, did Defendants' Exhibit C contain any indication of which firms if any you recommended to Mr. Killian?

A. Yes. We had at that time, from all the information, we had proposed that New York Sound be the one that he should contact and, you know, develop a contract with.

Q. How is that reflected on this document?

A. We clearly stated our first choice for recommendation was New York Sound.

Q. I am asking specifically on the document. Is it reflected anywhere on the document?

A. Yes, it is. There is a listing that says number (351) one choice.

Q. Are you referring to the fourth firm listed on page 1?

A. Yes, that would be the fourth listing on the document.

Q. Can you tell me on what basis you made that recommendation?

A. There was a number of considerations. First of all, there is the specified inventory to cover what we thought was a minimum condition for the site and whether or not it exceeded that.

THE COURT: By inventory you mean equipment?

THE WITNESS: Exactly.

THE COURT: All right.

A. There was also conversations with previous contractors of the services from the companies. We called a number of people who had worked with these firms and we got a number of recommendations. That was another factor.

We also talked with each of the companies in what I call looking for more than a sound company. I.e., we look for somebody who isn't there just to put up a microphone that's turned on and collect the check at the end of the day. We look for a company that's very involved, that provides a professional demeanor, a professional style in the performance situation, a company that provides a lot (352) of expertise and assistance to the performers to make them as professional as possible. In a number of instances of the types of programs that Central Park has produced this was of great benefit I think to some of the performers.

Q. Can you give me an example of that?

A. Well, for instance, one group that I am well acquainted with was a group called City Lore. It's their first year in business. They had close to 10 different types of performing acts on stage of all sorts of different music. Each group—some of them are folk musicians, who had never been on stage before. They had never used sound equipment.

The company provides a technician on stage to assist the performers in mike placement, location, in trying to get the best quality out of the equipment. This is something I always look for in any company because there are times on the job when you will not, you know, come up with what is actually specified in a contract situation. You will find a situation that the company has to give a little bit more, that you rely upon those people to be part of your overall team as far as if you are the producer.

Q. In your experience, New York Sound provided that equipment over and above the technical level?

A. Yes. In fact, we felt that their assistance—and this was partly due to some of the recommendations from (353) previous, you know, contractors of their services—we found that they looked to be an excellent company in that respect.

Q. Did you consider any other factors in your recommendation of New York Sound?

A. We considered a number of things about what they provided, their ability to provide a complete inventory for any event. What is listed on this document is essentially a minimum listing. They were able to provide in their proposal additional equipment in the sense that we could see 32-channel mixers, we could see almost anything that was needed. It was listed in their shop inventory provided at the time when they bid.

Q. Did you receive a document that contained their shop inventory?

A. Yes, we did. This is actually a small listing. They have more than what was listed. After we made phone contact with them we got an even more extensive list.

MR. PINES: I am now marking as Defendants' Exhibit D a one page document.

Q. I show you whats been marked for indentification as Defendants' Exhibit D. Is this the document you were referring to?

A. Yes, that is the document.

MR. PINES: Your Honor, I move this in evidence.

(354) THE COURT: Is there objection to the offer?

MR. KINIGSTEIN: Could I take a look at it?

THE COURT: Yes.

MR. KINIGSTEIN: No objection.

THE COURT: Proceed.

(Defendants' Exhibit D for identification was received in evidence)

BY MR. PINES:

Q. I notice there is handwriting on this document, Defendants' Exhibit D. Can you identify the handwriting?

A. Yes. That was some additional notes that were made at the time when we first called to try and get a more complete description of what these numbers represented.

Q. I am sorry. Can you identify the handwriting itself?

A. Oh. It is mine.

Q. And this is additional information you personally obtained from New York Sound?

A. Yes, it is.

Q. Does this provide a description of equipment over and above that that is contained on Defendants' Exhibit C?

A. Yes, it is.

Q. And did this play a part in your recommendation of New York Sound as the number one firm that you (355) recommended?

A. That was part of it. We did this with most of the companies because the original information submitted was not broken out in a clearly labeled form on many of the proposals submitted.

Q. So other firms also submitted additional information of this sort?

A. Yes.

Q. And based upon your consideration of all of this material, you recommended New York Sound as the number one choice?

A. Yes, we did.

Q. Do you know whether the Parks Department in fact retained the services of New York Sound at the bandshell for the summer and fall season of 1986?

A. To my knowledge, they did so. In fact, I think as—one of the things we recommended to Mr. Killian was that he try out this company on a trial basis and not engage in a one-term contract, that it should be a two-part activity at best. That way he would have a chance to see how well they worked over nine performances. If he felt that they were sufficient and satisfactory both in their competency technically and also in their personalities and working with performers, then he should go ahead and, you know, contract for the balance of the season.

(356) Q. Do you know whether Mr. Killian in fact did retain them for the balance of the season after the first nine performances?

A. Yes, he did.

Q. Did you have occasion to visit the bandshell during the 1986 season at the bandshell?

A. Yes, on a number of occasions. I visited it before the season opened. In fact, I have been to the bandshell over the last couple of years as far as viewing and listening to different events that have taken place there. During the '86 season I was there approximately 12 times.

Q. What was the purpose of your being on the site in 1986?

A. Well, the greatest reason was to, first of all, review the company that we had recommended to see if they were providing everything that was specified initially, and then whether or not they held up with it, because our sense of who we recommended, you know, whether or not we would continue to, say, recommend this company or if we would have, you know, different thoughts about how they finished out the end of the season, you know, if the company provides a lot up front at the first part of the season and then, you know, let's off towards the end, that's a consideration. There was also some groups that I had been (357) involved with in trying to assist them in their staging.

Q. So in some instances you in fact had an artistic interest on behalf of the groups you were helping stage?

A. Yes.

Q. Can you describe the first event you attended at the bandshell in 1986?

A. The first event that I attended was an event involving the policemen's auxiliary, and this was essentially I think his first formal opening performance. There was I believe the weekend before another program. But since that did not involve New York Sound, I was not there for that one, and as such my work had required me to be out of town, since it was not clearly one of our

obligations towards the group that we had recommended, I was not there for that weekend.

Q. What group performed on the that weekend?

A. I believe it was a group called Rock Against Racism.

Q. When you were on-site what exactly were your responsibilities, what exactly did you do?

A. Well, when I was on-site initially I provided an evaluation from our point of view as to the quality of the sound, sort of a tune-up kind of affect, saying that we should make certain changes in the placement of the speakers, that—myself and my colleague, we were involved (358) in taking a certain number of sound measurements. When I say a certain number, we go up and get sound measurements from the sound console all the way out to the perimeters of the areas, and this is approximately a 270-degree radius. We try to evaluate the frequency response and sound levels of the sound equipment on stage and how well it's working. This gives us some information as to the use of that particular setup by that given sound company. Another concern was how much sound was going over beyond the audience area into adjacent areas.

Q. Was part of your concern sound coverage in terms of evenness of sound?

A. That was a big part of it, because we were looking to see if the sound company had indeed provided enough equipment. If they needed additional speaker enclosures on stage, then that would have been asked for at that time. In that way we were providing advice to Mr. Killian, and he I think was relying upon our services to make that assessment.

Q. Let me try and understand this. You're saying that if, for example, you felt that the sound was insufficient and needed additional equipment you would make that recommendation to Mr. Killian, is that correct?

A. That's correct.

MR. KINIGSTEIN: Objection.

(359) THE COURT: It's a fair recapitulation of what the witness said, I think.

Q. Did you in fact make such a recommendation to Mr. Killian?

A. At the time we found that we did not see a need for additional equipment. The equipment provided by New York Sound was not even—it was running at approximately one-third of its given capacity.

We ran some sound tests with the sound company with some tapes we supplied to the sound company to provide, you know, some level test to see what the effects of volume versus distortion might be. That was sort of—typical of the things we did.

Q. Were you then satisfied that New York Sound's equipment was adequate to cover the bandshell area?

A. We found it to be more than adequate. In fact, in some aspects, for some of the performers that were on his schedule, we found that the equipment might have been more than what was needed and maybe less was necessary.

We did recommend that the speakers be placed up a bit higher on side scaffolding, which had been a point of discussion with the company. At that point we suggested to both New York Sound and Mr. Killian that the scaffolding be done. Mr. Killian and New York Sound worked out who would actually supply the scaffolding and who would build it. (360) They were looking for a permanent enclosure to be there all summer provided by the parks. I am not quite sure if Mr. Killian agreed to do that or if New York Sound actually completed the material cost aspect of that.

This was done because we felt we needed some more room on stage and it would also allow the speakers to be adjusted more

towards the audience area rather than straight out off the stage. So that the scaffolding would be built specifically for, you know, the requirements of the speakers.

Q. Did you have occasion to speak with any performers or anyone on-site with respect to the adequacy of the services provided by New York Sound?

MR. KINIGSTEIN: Objection. When are we talking about, the whole season?

THE COURT: Sharpen the focus.

MR. PINES: I will be happy to. If I might, I would like to ask the question generally. If the witness can respond with specifics, I will then direct his attention to that specifically, if that's permissible? Is it permissible? If not, I will rephrase it.

THE COURT: Rephrase it.

MR. PINES: Fine.

Q. Did you ever have occasion to speak to any performers on-site in 1986 at the bandshell with respect to (361) the services provided by New York Sound?

A. On several occasions I did so.

Q. What was your purpose in doing that?

A. The purpose was to provide some feedback as to how well the sound company was doing in providing services to some of the groups. Without specific dates or performing groups, on several occasions we did not identify ourselves as either being with the sound company or with the parks but sort of in a general way said "Would you hire this company? We're thinking of doing an event. Would you recommend that we do so?" We found that the reaction was generally positive. I know—

MR. KINIGSTEIN: Objection, your Honor.

THE COURT: On what basis?

MR. KINIGSTEIN: Generally, I think it's hearsay.

THE COURT: No. In essence, the witness was asking the performers how did they feel about this, and the response would be admissible under 803(3). I also accept it as the foundation for what this witness may then have done or recommended himself. But it is not hearsay, in any event. The inquiry may continue.

A. It was also my understanding from Mr. Killian that the sound company was contracted for services on other occasions outside of the bandshell by performers who had found that the services had been, you know, to their (362) satisfaction at the bandshell.

Q. Did you receive any indication from any performers at any time in 1986 that the services provided by New York Sound were in any way less than adequate?

A. No, I did not. And we were kind of concerned about that because we felt that this was, you know, Mr. Killian's first, you know, event, or seasonal event, and if we had made a recommendation that he was unhappy with then it would reflect on what we had recommended to him.

Q. Did any of the events for which you were present at the bandshell involve electrified instruments?

A. Yes. Actually, we had the full range of things. The events that I viewed, you know, and listened to ran the range of folk musicians with different varieties of ethnic music all the way up to things that I would call rhythm and blues, rock and roll, reggae, which included things such as electrified pianos, guitars, bass amps, full drum sets, some of the other, you know, various things, you know, as far as musical instruments go. But I would say we saw almost everything that was normally used by a group that's electrified.

Q. And did you feel in your opinion that the amplification provided for the louder events was adequate?

A. Yes. I think there was no real question about adequacy. I think there was a question of an esthetic (363) balancing of too much sound versus, you know, leaving it at a certain level. I think the sound company showed remarkable sensitivity to that problem.

Q. To your knowledge, did the musicians at these latter events ever indicate any displeasure with the esthetic mix, as you described it?

A. No. I think that was because they received everything that they needed in a monitoring mix on the stage. They were able to get the sound that they wanted to perform as a performer on stage.

There is a real difference between the sound on stage and the sound in the audience. You know, the speakers tend to put the sound out in one direction for whatever the designed criteria are for that particular speaker unit. The monitor situation generally is the more interesting and sometimes more difficult aspect for sound for performers you're not accustomed to working with. I think they managed to provide satisfaction for almost everyone I knew of.

Q. And during these latter events were you personally aware of any complaints from anyone in the audience that the mix was inadequate in any way?

A. I don't have any information that anyone was displeased in that regard.

THE COURT: Forgive me a minute, Mr. Pines.

(364) Following up on what you have just said, it sounds to me—correct me if I am wrong—that as far as sound mix is concerned you are drawing a distinction between what the performers hear vis-a-vis themselves on the stage during the performance—

THE WITNESS: Yes, that is true.

THE COURT: —and the sound mix which is projected out to the audience and is heard.

THE WITNESS: That is true.

THE COURT: Is it your view that both of these factors are important?

THE WITNESS: Well, very much so. If I as a guitar player have some particular need to address my artistic output as a guitar player and I need a better perception of what that is in the overall, you know, combination of say four guitar players, and I want some emphasis placed on what I am performing so I know what that is, or the converse can be true, if I want to hear my three colleagues playing more so than I want to hear myself playing, and that's in order so I can maintain proper rhythm or—you know, whatever, as a group performing together, you know, that entity, I would then be able to get that in a monitor mix. That mix in many cases is different than the mix that is provided in the audience.

THE COURT: Let me ask you if this is the same (365) point. The impression I get from reading reviews of the revised and rebuilt Carnegie Hall is that from the audience's point of view the acoustics sound pretty good, but I understand from reading in the paper that there is quite a level of criticism among the members of the orchestra themselves in respect of the acoustics as between the various members of the orchestra. Is that essentially what we are talking about?

THE WITNESS: I think that's a slightly different situation, but it has some performer-audience similarities.

THE COURT: I suppose what I have just talked about is the acoustics of the hall itself whereas you have been talking about

technical amplification and sound mixing. Have I come up with a less than helpful analogy?

THE WITNESS: I would say from my experience—let me see if I can correlate that. Some of my background has been with outdoor environments and also indoor environments. The indoor environments, most recently I have worked with the State University at Stony Brook and they have an indoor hall that has a steel shell. That's a natural acoustic device. The shell allows the performers on stage—this is classical as well as symphonic type works as well as soloists—to hear the other side of the orchestra. They can hear that very pronounced. In fact, (366) the conductor will set up his staging of what performers, you know—say the violin section, the woodwinds, so on, according to how he thinks the hall might work, and on stage it's much different than what you hear out in say the tenth row.

So the performers are accustomed to hearing themselves or say the other members in a particular way with particular accentuations. So when they changed the acoustics say in Carnegie Hall the performers who have performed there say for 20 years had developed a technique for what that was. By doing that, by changing the hall, the performers now have something different to adjust to.

Now, the audience may find that the sound to the audience has never changed. Now, some people seem to have their opinion about that. That part of it may be very similar to what were talking about, say the monitor situation on stage for a performer, say whether he's in an indoor hall with amplified instruments, a system that provides reinforcement rather than a natural sound versus what they are providing the audience.

The situation on most stages is that the monitors can be set up so you feed all the microphone inputs into the given monitor, so we can set that up any way we want to do that. The performer will consult with the sound company before his performance and say "I would (367) really like to get more of the piano mixed into

what I am listening to." He can specify that. And almost every sound company in the business, if they are on the job, will consult with the performers ahead of time as to what these requirements may be.

You can go so far as having an extra mixing technician on stage with another mixing console to provide an active mix song by song. These are, you know, features that you would look for in a sound company, their ability to provide this capability. In general, most of the people will play a set and they will set it up—a set being a collection of songs say—and then they will make adjustments. There is a certain amount of tune-up and a sound check that's required for the sound company to—it's just like the violinist—to fine tune his instrument.

So these are all parts of that. Here again, the performers on stage very rarely can tell exactly what the sound is out in the audience area and that's left up to, you know, someone either like a producer or someone from the group that may have a sense of that, where he can lean over to the sound technician and say "We really are accustomed to this group having more of this," and the sound technician, with the myriad of knobs and dials on the control panel, can make a very quick adjustment and bring up exactly what's required.

(368) This is similar if you go into a recording studio, where the performer has a headset on, and he gets exactly what he needs, and with the headset he may not get the 24 other tracks of, you know, other singers, he may get himself and just the piano, but when they do the mix in the booth, then they can mix in everything together and he becomes part of the collective whole. That's something that's more of maybe packaged sound versus say live outdoor sound which you're doing on the spot. It's a little more interesting. It's really by most accounts a different field. Most people will set themselves up doing one or the other.

THE COURT: Okay, fine. Thank you.

Forgive that intrusion, Mr. Pines.

MR. PINES: Fine, your Honor.

Q. If I could ask you, you referred to the advantages of some advance notice with the performer. Is that a fair statement, there is an advantage to this kind of advance notice?

A. Yes. I think it's two-fold. It helps the performer by making sure that he has had contact with the sound company to try to get his particular needs addressed. If he has a special item, then he has, you know, the opportunity to make use of that the day that he shows up.

It's unreasonable to ask, especially in New York (369) City I think on say a Saturday morning, to try and track down in this town a given piece of gear on that day. Now, most sound companies will try to have in their inventory a large collection of the most commonly used items of the highest quality so that they are covered if they never made contact with the given group. That way you have a certain number of things that, you know, you would provide automatically. But if there was something special, a special type of delay unit that was an obscure type unit—this happened to us last fall, where I worked with a gentleman named Carlos Nakai, a Native American Indian who does electronic sound as well as natural sound, does a lot of film work. I was in the situation with the sound company that we needed to provide a special delay reverberation type unit. It is not a common unit. We talked to him a week ahead of time and had that information and within several days were able to obtain that item. We had to rent that at our expense as the producers.

Q. Are you speaking of the Naumburg Bandshell?

A. No, no, no. This is a separate item. What I am trying to describe is something that is more typical of the trade practices.

Q. I understand. But this was not a Naumburg Bandshell event?

A. No.

(370) Q. Do you know whether at the Naumburg Bandshell there was any mechanism by which New York Sound was able to obtain advance information in helping to plan events at the bandshell in 1986?

A. Yes. As far as the—this was a situation that I had discussed with Mr. Killian to try and make this the best possible arrangement, his questionnaire as a starting point that he would send out several months in advance to the groups.

Q. Let me stop you for a moment. I direct hour attention to Joint Exhibit 1, page A 95. Can you identify the document?

A. Yes. This is a document similar to what I had proposed to Mr. Killian. I would also like to mention the next page, A 96 here, is the second page of the same document. This is all the information.

Q. I direct your attention to pages A 109 and A 110. Is there anything on these pages that is the kind of information that you're talking about in terms of assisting New York Sound in advance of the event?

A. This is the first time I have seen this particular document.

THE COURT: Take your time.

Q. Let me just direct your attention, to save time, to A 110, the section headed Electrical Energy. Is any of (371) that information of any assistance?

A. I would find that this would be less than adequate. It specifies the electrical need, but beyond that the description of electrical amplification I find is not as helpful as I would want it to be. It is less than useful information.

Q. So would you then need the information provided on A 95 and A 96?

A. To be perfectly honest, I would want them both.

THE COURT: But what we are talking about now, Mr. Floyd, is information which would then fully advise the New York Sound Company with respect to what they should have available or provide in order to guarantee the quality of the performance. Am I right in that?

THE WITNESS: That is correct.

A. Following up from what you asked before, the second part of it beyond the questionnaire, things can change from the time the questionnaire is sent in to the time of performance.

The sound company had the habit of calling performers ahead of time. They would obtain from Mr. Killian the number and contact person with the group to try and arrange, you know, information as to what the specific needs might be. This is to their benefit because if the company only requires say two microphones versus twenty (372) microphones the company would not provide a full inventory on-site unless it was needed. They would be able to save some manpower at the shop. And so it was to the company's benefit to make this determination.

Q. Were there any circumstances under which it would be to the performer's benefit?

A. Yes. Almost every group that I have worked with, we try to provide a sense of stage management from the group as to what their setup might be, what their electrical requirements might be as far as power required in addition to what is already there. If there is a problem, then you can work on it ahead of time.

Q. You spoke about an incident that didn't occur at the bandshell in which a sound firm that you had some dealings with was able to provide some relatively esoteric equipment. Do you know whether there were ever any such instances in your knowledge in which New York Sound performed a similar service for performers at the bandshell?

A. Not to my knowledge. As far as I know, they met all the needs.

Q. Can you identify for me the loudest performance, the group that provided the loudest—

MR. FOSBINDER: Objection to the word loudest. There has been no evidence that loudest is scientifically determinable in any way and that's the clear thrust of this (373) whole argument. What does he mean by loudest? Is he referring to a scientific measurement or a subjective measurement?

THE COURT: I would be obliged if you stand when you address me, if you have an objection.

MR. FOSBINDER: I am puzzled by the use of the word loudest. I think it's too vague. What does loudest mean? Is he referring to it in a scientific manner as an expert witness or is he referring to it in a perceived manner—

THE COURT: I think you better rethink the question, Mr. Pines. I think the objection is well-taken.

Q. With respect to the performance that involved electric instruments—I am speaking now about the event that you referred to that had electric guitars, electric piano, drum sets and other instruments—were you speaking at that time about a specific performer?

A. Yes, I was.

Q. What music was that, what kind of music was that, if you can qualify it?

A. Well, I am not sure that I would be the musicologist here, but I would describe it as rock and roll reggae, maybe. The sense of determination of that group is what I mentioned earlier. In making the sound checks we did use a standard meter that measures in the standard (374) units of sound, known as a decibel. We looked at sound on an A scale and a C scale as far as what the

ratings refer to. In this sense there was measurements of sound, as I mentioned before, at the sound console and at the perimeter of the audience area and at the back of the site of where the bandshell is to see, you know, what the falloff of sound might be.

This was partly, you know, the reason why we changed some of the speaker, you know, location, was to provide a better sense of coverage and more enclosed area of sound rather than trying to send sound out beyond the particular audience area.

Q. How did you attempt to accomplish that?

A. What, the sound measurement or—

Q. The containment of sound.

A. Well, this is a particularly difficult thing to do in that area because you're dealing with an outdoor site. What we did do was try to redirect the speakers so that their coverage was more directed towards the audience area directly. This was done by raising the back of the speaker columns so that the sound was focused more towards, you know, the audience area.

Q. The columns were angled down? Is that fair to say?

A. Yes. As I say, we did do the measurements and (375) we found that this helped, but it's not a total solution. The thing that you have to go by is maybe at what point is the sound, you know, fallen off a bit to where you can do other events or other activities perhaps. This gets to be—you know, you interfere with some other activity.

There were different levels for different types of sounds. We found on the average of the number of times that I was there on-site we were looking at approximately 80 decibels to 85 decibels out at the sound console.

Q. Which is where in relation—

A. That's approximately 60 feet from the stage.

THE COURT: Hold on just a minute, please.

(Pause)

THE COURT: Thank you. Go ahead.

Q. Did you have occasion to travel into the audience during this concert, the reggae rock and roll concert?

A. Yes, we actually were in the audience. One of the measurements that we take is the sound at the speaker itself, within three feet—generally about one meter is the specific distance that most specs use—to see what the output was and what the axial response had been. That was, you know, just to satisfy some of our own curiosity.

Q. Axial response being the dispersion of sound with respect to a straight line pointing out from the (376) speaker?

A. Right, exactly. We took measurements out at the back. One of the reasons this was done, one of the particular groups I worked with had proposed to Mr. Killian that they would like to run additional craft and instrument makers and demonstrators of folk music traditions at the back of the audience. So we were looking to find the areas that might serve best, you know, for those purposes.

That particular group, City Lore, found that they put out eight additional exhibitors in the same area, at the back of what I would call the audience area, without having any problems there, and the people at the back of the audience I think found that the sound still was sufficient for whether they wanted to stand or listen or get up and dance.

THE COURT: You spoke of taking a reading three feet from the speaker. There is more than one speaker in this setup, isn't there?

THE WITNESS: Yes, there is. How much amplification do you want?

THE COURT: That satisfies me. I just wanted to make sure this wasn't a one-speaker operation. I didn't think it was.

THE WITNESS: No.

Q. Perhaps you can say how many speakers are (377) available to New York Sound. What was the largest number of speakers—well, that's two questions. How many speakers to your knowledge are available from New York Sound for Naumburg Bandshell performances?

A. Well, we can count the boxes or we can count the number of speakers in a box. We can do it several ways. I am not sure that—as far as the number of units out there that cover it, I would say there was approximately eight offered. I think as far as the type of unit that they use, the particular model of speaker cabinet with all of its innards, there was on the average eight units used for each event, on the average. Some events, you know, you needed more or you needed less.

Q. And how many speakers per enclosure, per box?

A. Well, in their particular instance—

THE COURT: I don't think I need to know that. You're talking about things like woofers and tweeters inside boxes, is that right?

THE WITNESS: Exactly.

THE COURT: I don't need to know that.

Q. In any case, I take it your testimony is the sound levels were adequate for all purposes during the 1986 season at the bandshell?

A. We found that we could—

MR. FOSBINDER: Objection. I don't mind the (378) leading so much, frankly, but I mind the term "adequate for all purposes."

THE COURT: Yes. I think you better cast it in terms of knowledge of complaints or to the extent—I don't know, Mr. Fosbinder. To the extent that the witness himself was there at concerts—

MR. PINES: Your Honor, I can clarify it, because the witness has testified about how he measured adequacy of coverage.

THE COURT: All right.

Q. As far as you actually measured in terms of sound coverage for an audience, I take it then that New York Sound's sound coverage of audiences for the events at which you were personally present was adequate as you measured sound coverage?

A. Yes, we found it to be quite sufficient. Some of the things I have been involved in—this is more for indoor halls—is that we do take readings because you find that there are dead spots in a given hall. I would not say that I am the electrical engineer who designed some of the more high order systems that are out today, where they use computer analysis, I cannot make that sort of claim, which—you know, I won't go any further with that—but we take, you know, samplings around the site and part of that, you know, as I mentioned, one of the reasons we (379) got into that was to look at what else could be done in the area, hence the speakers being like light beams, sort of broad ones at that, whether or not we would have for instance say groups on the side that we would need additional reinforcement for groups, you know, off to a given side. We found that we didn't—everything was satisfactory.

Q. In your opinion, is New York Sound's equipment adequate to produce sound for a rock and roll event involving guitars, drums, electric keyboards and vocalists?

A. We found that there should be no reason why they could not do such an event. Some of the people that we talked to had used their services in coliseums seating 4000 people or more for that purpose and I would say that if you wanted to raise the vol-

ume level to the threshold of pain for the first ten rows I think they could probably satisfy the need.

Q. Do you know whether consultants from the sponsoring groups were able to interact with New York Sound during performance?

A. Yes. I mean, you're speaking of the performers trying to make changes?

Q. That's right.

A. Yes.

Q. That was done?

(380) A. On the events that I was there and noticed, there was, you know, a lot of interaction. They generally provided one man on stage and one man at the mix console.

Q. To your knowledge, was that person involved in the actual mix that was obtained?

A. Yes.

Q. Are you yourself affiliated in any way financially or otherwise with New York Sound?

A. No.

Q. Are you familiar with the concept of temperature gradients?

A. Yes, I am familiar with the term and with the implications of what some people make of it. In my experience, especially at the Smithsonian, when we did outdoor events starting from early in the morning til' late in the evening, we generally found in the outdoor situation most of our people probably neglected it, you know, it was not a factor that was a major consideration for our people. They found that a greater thing was perhaps the fatigue of the performers and the fatigue of the technicians if you're working a long day.

MR. PINES: I would like to have marked as Defendants' Exhibit E, I believe, two pages of documents, and for the record I would like plaintiff's counsel to stipulate that the two pages, one of which is handwritten (381) and one of which is printed, are equivalent to the best of our ability to decipher the legibility of some of the writing. For example, I notice that one of the entries is partially illegible and is noted on the document as such. But with that provision, will plaintiff's counsel stipulate to that fact ?

MR. KINIGSTEIN: Yes.

MR. PINES: Further, I would ask plaintiff's counsel to stipulate that the handwritten document was provided to defendants by plaintiff's counsel as a listing of equipment that I believe Alan Thompson owned. Is that correct ?

MR. KINIGSTEIN: Used by Alan Thompson for the Rock Against Racism concert.

MR. PINES: All right.

Q. I show you what has been marked—

MR. PINES: Can we stipulate to its admissibility? This witness will not be able to offer—

MR. KINIGSTEIN: Yes.

THE COURT: All right. I will receive it. Just to make sure I understand what it is that I am receiving, it is a list of sound equipment as best as we can decipher it actually used by Mr. Thompson in producing a Rock Against Racism concert. Is that true?

MR. KINIGSTEIN: True.

(382) THE COURT: Do we know what year?

MR. PINES: 1986.

MR. FOSBINDER: If I may, this is just a list of the sound equipment per se. There were other instruments and devices.

There are some things sort of on the boundary of sound amplification and interfacing between the instruments. I am not sure. Some of that may be missing.

THE COURT: What I now have by stipulation is a listing of the sound equipment that Mr. Thompson used—

MR. FOSBINDER: Understood to be the sound system per se on that event.

THE COURT: Sound system per se, RAR 1986, correct?

MR. FOSBINDER: Correct.

THE COURT: So stipulated, exhibit received.

(Defendants' Exhibit E for identification was received in evidence)

BY MR. PINES:

Q. Mr. Floyd, have you had occasion to review this document before taking the stand this afternoon?

A. Yes, just this afternoon.

Q. Prior to taking the stand?

A. Right.

Q. Have you had an opportunity to compare this array of equipment with the array of equipment that was (383) provided to the Department of Parks and Recreation by New York Sound?

A. I find it essentially—

Q. Let me first ask you, did you have occasion to do that, make that comparison?

A. Yes, I have.

Q. Were you able to come to any conclusion about let's say the relative depth and scope of this equipment?

A. I find it essentially equivalent. In some instances I might rate New York Sound Company's say amplifiers a bit better than what is shown on this.

THE COURT: You say that with respect to the amplifiers?

THE WITNESS: Yes.

A. I think this may be—here again, this is my considered opinion. I think you will find that everyone has a favorite. I do not find that the particular item specified here is in any way bad or in any way inadequate. Let me make clear this is a perfectly adequate list.

I also find in comparing it with the list provided by New York Sound that they are very similar in listing and capabilities, though the other one, I personally would give a slight edge to that particular item.

Q. Am I correct that your understanding is that the list of equipment provided by New York Sound is not an (384) exclusive list in terms of the equipment available from New York Sound if needed?

A. No, I know from their bid list, for instance, that they would supply a 32-channel mixer and sufficient microphones for 32, you know, microphone inputs.

Q. So it's fair then to say that New York Sound's equipment exceeds that that was listed on the document that you have identified today?

A. As presented on these two pieces of paper, yes.

Q. Perhaps I would ask you to clarify, if you might, because we have been speaking about two apparently independent sound mixers, that being the sound that's disseminated to the performers through the monitors and the sound that's disseminated to the audience through the speaker arrays facing the audience. Are all of the artistic adjustments that you have discussed at the mixing board available for both the audience mix and the performer mix?

A. In answer to the question, yes, but this could be a variable. You could have these mixes made either on stage or at the mixing console, depending on the particular needs of the performers.

Q. And the performers have esthetic input into both types of mixes, is that correct, at the Naumburg Bandshell?

A. Yes, that's correct.

(385) MR. PINES: No further questions.

THE COURT: The wind is rising and the hour grows late. There is some considerable cross-examination of this witness, is there?

MR. KINIGSTEIN: I would think, yes, your Honor.

THE COURT: Mr. Floyd—

MR. PINES: Your Honor, if I might. I know that Mr. Floyd, if possible, will make himself available, but he is not a New York City resident. He has traveled in from Long Island, I believe. Unless it's unreasonable to ask, I would request that we continue with the cross.

THE COURT: I can give you a few more moments, say until 10 minutes of 5. But if there is no realistic notion—

MR. FOSBINDER: I think that will do it.

THE COURT: You think so?

MR. KINIGSTEIN: Yes.

THE COURT: All right, fine. I certainly don't mean to foreclose or pressure anyone.

MR. FOSBINDER: Can I ask that we figure out our schedule with the other city witnesses? I had a plane reservation for tonight.

THE COURT: Off the record of scheduling purposes.

(Discussion off the record)

(386) THE COURT: Cross-examination of this witness.

CROSS-EXAMINATION

BY MR. KINIGSTEIN:

Q. You mentioned on your direct testimony, Mr. Floyd, that you met with Joe Killian in January of 1986, is that correct?

A. Yes, I did.

Q. Then you also mentioned that the letter recommending the different sound systems was written in April, is that correct?

A. That is correct.

Q. April of 1986. Do you know when New York Sound was then hired by the city?

A. No, I do not. I don't have the contract information. We just made the recommendation.

Q. You just spent on your direct testimony some time discussing the technical aspects of the New York Sound system, but isn't it true that the single most important factor in the reproduction of amplified sound, of this type of amplified sound, is really the person who is working on what is called the soundboard, or the engineer?

A. Not necessarily.

Q. Please explain your answer then.

A. Okay. I think you are correct in your statement in that if I would draw the analogy, an excellent (387) photographer could produce excellent pictures with any camera, including say a Brownie, a pinhole camera, whatnot. Those are going to be limited to the technology. As the technology gets increasingly sophisticated and complex with a given sound system you may find that the gentleman at the mixing console needs to know the particular equipment.

It is not uncommon—and I have seen it done—that one group may use another sound company's equipment and have their mix man or mixer sit at the console and actually do the mix. I have also seen it done that someone from the other group would sit with the fellow who knows the particular equipment and would specify that "I need this particular type of thing done."

Q. Very good. Let's speak specifically about the sound systems, what's been marked as I guess Defendants' Exhibit 4, Alan Thompson's list of equipment.

THE CLERK: Exhibit E.

THE COURT: Exhibit E.

Q. I'm sorry. Exhibit E and Defendants' Exhibit C. Between these two systems, which you stated were comparable, isn't that correct—

A. Yes, that is correct.

Q. —isn't it true that the single most important factor in two comparable sets of equipment like these is the person who is working the soundboard?

(388) A. No, I expect that knowledge and experience will transfer across a given type of equipment. Okay? I can step into a recording studio and be able to identify the equipment and what the controls should be doing and I have never seen that piece of equipment before.

Q. That's not what I am asking. What I am asking is that you can have two comparable systems, like we have here, that you have stated we have here, but that we haven't discussed or you haven't discussed yet the issue of the person who is in control of that system as having a definitive influence. I am asking you, isn't it actually a definitive influence in the way that sound is reproduced from the artist to the audience?

MR. PINES: Your Honor, I have to object. I have no objection to the leading nature, obviously, but I think that the form of the question makes it impossible to understand.

THE COURT: Well, I am more interested in whether the witness understood the question. Did you, sir?

THE WITNESS: I think so.

A. I will try and answer you to your satisfaction. I place high reliance on the technician at the console in knowing what the equipment should do. I would say that I have been able to change or influence the overall quality of the sound by giving specific directions to the person at (389) the mixer. Okay? So what you're presenting, that person controls the sound, if no one says anything to him, yes.

You have left the decisions and esthetic choices up to that individual. If no one has said "This is the kind of sound we want"—usually that person gets that information within the sound check at the beginning of the performance. The performers are generally very, very instructive about what they like and dislike; "Now, I don't have enough of this. Give me more monitor gain on this." If the operator is experienced and competent, then he gets it very quickly.

I have seen it done within two measures of music that someone can bring the sound right out, where you thought it was good it is now great. I haven't seen many operators who have that talent. I don't usually expect to find that with most operators. I think that a lot of people, you find that there are people who design systems, people who set up the systems, and they can go home. Then they leave a guy to run the mixing console.

Q. So your answer is no? I take it your answer is no?

A. I don't know that it's a complete yes or no question.

Q. All right. Then let me ask you this.

A. Excuse me. If you gave me a particular (390) individual on a given console and who could run the best job on that—but I have to go back to saying that I can still make that influence as, you know, a given individual from the group in giving instructions, because the gentleman is an operator, you tell him where you want to go.

Q. Isn't it true that an individual operator at a mixing board who spent much time working with a band will have a better understanding of how that particular band would want their music to sound?

A. Yes. I would say that most operators, if they have spent, you know, say a 30-day tour with a given group, would know something about that individual group's requirements. You know, there is no question there. I don't see that there is any difference.

I also would say that most people who have any experience know the trade, have worked for years in it, and can apply that same knowledge within an instant with any group.

Q. Within an instant, is that what you said?

A. Well, let me give it a little bit more than an instant. But an instant on stage is generally five minutes. Let's say relatively speaking, you know.

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(399) Q. Are you familiar with the term the dynamic range?

A. Sure.

Q. Do you know how much dynamic range there was at the concert that you were at?

A. Well, at—

MR. PINES: Your Honor, I object. Foundation.

THE COURT: I will let him answer.

A. You're looking at—with our equipment we generally measure 20 cycles to 20,000. Okay? Some of the equipment will actually do better. You know, here again you need to get into some of the better test equipment; i.e., my colleague is now, you know, involved with some stuff that he is measuring down to 1 or 2 cycles all the way up to approximately 30 to 40,000 cycles. These are not the kind of specifications we look at in the outdoor situation. The normal practice is to think of 20 to 20, as it's described.

Q. 20—

A. To 20. That means 20 cycles to 20,000 cycles.

Q. As the range for an outdoor concert? I am confused.

A. I'm sorry. I am confusing you with maybe (400) frequency response versus dynamic range.

Q. Right.

A. Dynamic range is actually—we talk about a system, for instance, the compact disk players today have greater dynamic range than your cassette units. That means we can put a greater amount of amplitude on the same signal.

Of course, some of the signals—when I was speaking of 20 to 20, we measure sound energy at different levels at different frequencies because it requires more energy to produce say a bass note versus say a high frequency note. The cabinets are larger, so you need a bigger amount of energy to drive, you know, 18 inches of a sub woofer, say, versus say high frequency tweeters.

Q. I am asking you specifically what the dynamic range was at the concert that you were at at the bandshell.

A. Okay. We looked at things that dropped down to approximately 60 and the loudest we got to I would say was approximately about 100, 105.

Q. Would you say there is a 40-decibel dynamic range? Would that be an accurate statement?

A. I would actually look at—as far as the performers themselves, they provide approximately 40 to 60 dB of dynamic range.

Q. Would you call that a normal dynamic range for an outdoor concert?

(401) A. Depends on the type of performers. I would say yes.

Q. Like in a rock and roll concert, would it be more?

A. It's really—where do you want to draw the line and start marking? Do you want to draw it at 40 decibels and go up to 100 or do you want to draw it at 40 and go up to 80 or are we talking about a group that starts at 80 at their quietest and goes up to threshold of pain?

Q. Let's say that the ambient noise was at say 60.

A. That's a fair—

Q. Okay. Tell me in your opinion what the normal dynamic range would be then for a rock and roll concert at the bandshell.

A. Okay. We would generally look at close to 80.

Q. You're starting at 60 and you would go up to 80?

A. Yes, if you're talking about rock and roll. Doing rock and roll at the bandshell, I would expect to see that kind of difference.

Q. Is that including peaks as well?

A. Instantaneous peaks, you could probably go even higher.

Q. You could go higher?

A. Depends on the sensitivity of your measuring device. Here again, peak versus average.

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(408) Q. You indicated in your testimony on cross-examination that there are some technicians who would be capable of making certain kinds of adjustments to perform sight unseen within a relatively short period of time. You say that would be five to ten minutes, is that correct?

A. Well, I would say, as I mentioned also, I know one individual who I have actually observed him be able to track within a few bars of music to make adjustments of a group that he has never seen. I think he is a rarity, but there are people out there with that kind of talent. But I would say that most people in trying to adjust all the things on stage and everything at the console generally it's a few minutes. You know, I mentioned five.

Q. Would you say that New York Sound is one of the outfits that can provide that kind of service in that period of time, five minutes?

A. I would say so.

Q. Let me ask, do you know whether any sponsors used New York Sound outside of the bandshell events?

(409) A. Well, Mr. Killian had mentioned that several of the groups had found their services to be more than satisfactory, to the extent that they had used them for other events, you know, outside of the bandshell.

Q. Based upon your total experience with New York Sound at the bandshell during the events that you witnessed, could you give us your professional opinion as to the overall quality of sound provided by them from the performer's point of view?

A. I think they are representative of the highest standards of quality of work that you could expect to find. I think, you know, you could find a number of companies to provide that, but I think they are typical of, you know, some of the better companies that are in the trade.

Q. Thank you. No further questions.

BY THE COURT:

Q. To follow up on that for a moment, you have said something of the equipment. Is it fair to say, Mr. Floyd, that during the 1986 season in the bandshell you attended a number of events for the purpose of monitoring the performance of New York Sound? Is that correct?

A. That is correct.

Q. And in the course of that activity on your part did you form an opinion as to the professional competence of the New York Sound Company's technician or technicians, (410) the sound mixers?

A. I think in general they were always agreeable, very helpful, considerate of the performers. In fact, I think they supplemented the stage management staff that was there. It was like having two extra, you know, staff members for the overall staff provided by the parks service.

Q. You make them sound like pleasant fellows. Did you form any opinion as to their technical proficiency or competence?

A. Yes. I think they are very competent. I would not hesitate to use them again if, you know, the need were to be.

THE COURT: All right.

MR. PINES: Your Honor, I have one quick question.

THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. PINES:

Q. In any event, did you see Mr. Killian or anyone from the Parks Department intervene in any esthetic judgments or requests that were being made by performers?

A. No, I can't say that I ever did. I think he had quite a number of other problems and I think he was totally comfortable with the sound company after the initial conversations, you know, as to platforms and different (411) needs by each group.

Q. Again, in 1986 did you see any representative of the city that you knew to be a representative of the city, police or anyone from the Parks Department, again, intercede in any esthetic request made by performers to New York Sound?

A. No.

Q. Thank you.

THE COURT: That was entirely beyond the scope of the cross, so I will permit counsel an opportunity to pursue it further.

RECROSS-EXAMINATION

BY MR. KINIGSTEIN:

Q. Did you ever take any measurements at the property line at Central Park West?

A. You're referring to the top of our map here?

Q. Right, I am.

A. No. All the way across the park, say at the arch or the Women's Gate, no.

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Transcript of Proceedings on March 23-25, 27, 30, 31 and April 1, 1987
Testimony of Joseph Killian, Witness on Behalf of Plaintiff

(436) JOSEPH KILLIAN,

called as a witness by the defendants, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FOSBINDER:

Q. If you would, Mr. Killian, would you please describe your job duties as you understand them?

A. Yes. I work for the City of New York, Department of Parks and Recreation. I am the program director-manager for the Central Park Bandshell, Mall and Bethesda Terrace area.

(437) Q. What powers do you have relative to that job?

A. I manage events that go on there, I conduct on-site—I along with a group of other people conduct negotiations with various groups wishing to use the facility. In addition to that, I plan, promote and book a series of concerts at the bandshell called Summer Stage, I help groups use the facility in terms of obtaining sound permits or any other permits they may need, inform them of park policies, and generally serve as a liaison between the Parks Department and the public sponsor or the private performing group.

Q. Would it be fair to say that you understand the permit application process for the Naumburg Bandshell?

A. Yes.

Q. Could you explain it to me?

A. The permit procedure is usually someone will obtain a special events permit application, they will fill in the information,

mail it to me. Subsequently I will mail them our use guidelines along with a supplementary application we have specific to the bandshell. I will also mail them a technical requirements form. They will send those back to me and at that point we continue with the processing of the forms.

Q. Can you tell me how long this process takes?

A. Well, it depends basically on what their (438) response time is, what that turnaround time is. I mean, that time could take, you know, a day to that point. To point of approval it can be longer, however.

Q. Could you give me an idea of what you perceive to be the average length of time between your receiving all of the applications necessary and the actual issuance of a permit?

A. Average time is a minimum of two to three weeks and I would say it can take as long as eight to ten weeks, because what happens in the procedure is after we receive these applications they are disseminated throughout the department to various people who have input in Central Park. We have operations meetings where we bring the event up—

Q. Let's go back to the whole procedure in a minute. Could you tell me whether or not it's true that some applications have been granted and the permit issued within two days of the original application?

A. I only know of one extraordinary incident.

Q. Could you tell me whether or not it's true that in some cases four or five months have elapsed between receiving all of the papers and issuing the permit?

A. The entire pack of papers? No, sir.

THE COURT: How long have you held this responsibility, Mr. Killian?

THE WITNESS: January 26, 1986, January 27, 1986.

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(449) Q. Would past experience be any consideration in whether or not a cleanup bond is required?

A. That's correct.

Q. Would a group that for seven or eight straight years has posted a cleanup bond and had all of the cleanup bond returned after the event by the city be entitled to have this consideration waived, this requirement waived?

A. If they requested a waiver that would be a consideration. However, it's more often the case—when I say previous experience—where it goes the other way, where it's a smaller group that we have to request a bond.

You see, a cleanup bond is something we're very careful about because we want to insure that the area is clean. However, on the—speculating on what you said, I imagine in that case it's possible, yes.

Q. I would like to turn to the question of sound (450) regulation.

A. Yes.

Q. Could you give me some indication or tell me what you remember about your initial information that was given to you by the city once you got your new job about sound problems at the bandshell?

A. Yes. There were many problems with sound at the bandshell, one problem being that groups were often unfamiliar with producing events outdoors and they would come in with inadequate equipment and both their event and also the audience who was there to see it would suffer.

Q. Could you tell me who told you that?

A. I can say that I conducted a number of interviews with people within the department. I don't think I can say for a fact which individual it was.

Q. Can you tell me which individual it might have been?

A. I had a number of meetings.

MR. PINES: I object to the form of that question.

THE COURT: Sustained as to form. You can ask him to be more specific with whom he had interviews.

Q. Can you tell me who you spoke with when you were first hired—

A. Certainly.

(451) Q. —who briefed you about your job?

A. Well, I consider that two different questions. I was—the amount of people I interviewed were people who were working hands on, Kate Pearson being one of them, William Dalton being one of them, Sheldon Horowitz being one of them, Ron Cianciulli being one of them, and other people in other offices who were directly at events or directly dealt with permit procedures, all the way down to the section foremen. So that's where I received my information from.

Q. This may be repetitive. Let me get this clear in my mind. Do you have any recollection of any specific individual who you have just named telling you that there had been a problem with bad sound amplification technique at the bandshell?

A. Well, I think almost—many of the people said that there were problems with sound there. I mean, you know—

Q. I am not talking about problems with sound. I am talking about bad technique.

A. I can't name an individual. However, it was brought up numerous times.

Q. Did you at any time inquire as to what the basis was for this claim that bad sound amplification technique was a problem?

(452) A. I did, and it seemed to be the answer was people came in with inadequate equipment or perhaps an inexperienced sound company or perhaps someone who hadn't worked outdoors before.

Q. But you don't remember who told you this?

A. That's correct. I can't name a person.

Q. But you asked about it?

A. Sound was one of many concerns I asked about when I was creating not only the guidelines but a format for use of the bandshell.

Q. What did you do to attempt to find out the truth of this claim that band sound amplification techniques were the problem?

A. Well, it's the kind of thing where it's difficult to say what would be constituting bad sound amplification, and I did not try and contact any of the sound companies that had been there before or any of the vendors who had been there before. I have worked in special events before. I know that there are companies who are excellent indoors and you get them outdoors and they are going to be terrible, or they are excellent—for instance, someone speaking into a microphone, you can use smaller speakers, and if you want a band you need special microphones for different instruments and different amplification techniques.

(453) Q. What did you do to determine whether or not there was a problem with the quality or the technique of the sound amplification which had been used in the past at the Naumburg Bandshell?

A. In the interviews with people I took their word on face value that that had been a problem, and I am not sure of any other

way one could research it without having audio tapes. For instance, on all of the special event forms you will notice we weren't requesting who their sound company was, we weren't requesting an inventory of their materials. So it was a little difficult.

Q. All right. What did you do to attempt to cure the problem which you took on faith existed, the bad technique or bad sound amplification?

A. That wasn't the only problem with sound at the bandshell, and what I did—

Q. I didn't say it was the only problem. I said what did you do—

A. I took the lump sum of all the problems at the bandshell in regards to sound amplification and—

Q. What were the other problems with regard to sound?

A. Well, one of the other problems is we have Sheep Meadow, which is a designated quiet zone, in fairly close proximity to the bandshell.

(454) Q. Could you tell me what that means, designated quiet zone?

A. I don't think I could tell you the letter of the law.

Q. Do you know whether there is any law regarding Sheep Meadow?

MR. PINES: Your Honor, I object on the grounds of relevance and this witness' competence to testify about the state of the law.

THE COURT: Well, he has said that this was one of the other sound problems he had with respect to the shell.

MR. PINES: He has established that the Sheep Meadow is a quiet zone, which I think is not contested. What the source of that regulation or provision is—

THE COURT: I will permit the inquiry to be made. The witness says the Sheep Meadow is a designated quiet zone and counsel wants to know what that means. I will permit it.

Q. What does that mean?

A. What we try and do in the department is we're trying to serve all the people who use the park, and generally Sheep Meadow is regarded as a quiet zone, which means if you're going to listen to a radio or a Walkman it's with earphones. Generally what we try and do at the (455) bandshell is keep the music within the concert ground confines rather than bleeding out to other areas.

Q. I don't think that is responsive to the question. The question is—you have said that one of the considerations was that Sheep Meadow was a designated quiet zone—what does it mean that Sheep Meadow was a designated quiet zone?

A. I am not sure I can answer you in a legal way. All I can say is that it is generally regarded within the department as an area that is either radio free or if you have a radio that you're listening on earphones. It is a place where we try and have quiet for people to sunbathe or do whatever they wish at Sheep Meadow. Beyond that, I—that's how we regard it, that's how I regard it in terms of events taking place at the bandshell.

Q. Who do you mean by "we"?

A. I am speaking of other employees I work with at the Parks Department.

THE COURT: What strikes me about your phrase "designated quiet zone" is the word "designated." In English to me that means a particular and precise designation, as in a designated hitter in the American League. Everybody knows who he is because the manager says so.

THE WITNESS: I can say it's designated by the (456) Mayor and the parks commissioner, but I can't say exactly what the precise—

THE COURT: Is it in writing or a document of any sort that you know of?

THE WITNESS: I haven't seen a document personally.

THE COURT: All right.

Q. What other problems with regard to sound?

A. Sound amplification is a problem. For instance, we have on a given day, Saturday or Sunday, in Central Park 100,000 people. We're trying to serve as many of them as we can. There have been numerous studies done of the park, a user survey and other ones, that clearly point out that most people come to the park for passive recreation. Relaxation, napping, walking, are popular pastimes. Of course, we don't do that exclusively. I mean, there are ballfields. There is all kinds—there is roller-skating, there is volleyball, and certainly the bandshell is an area for concerts and speeches.

Q. Have you in looking through these studies found anything which indicated to you that the level or type of First Amendment activity in Central Park was such that usage in the park was being reduced by others, that is, people other than those attending the First Amendment-related events?

(457) MR. PINES: Your Honor, I object to the form of that question.

THE COURT: I confess, Mr. Fosbinder, I just don't follow that at all. Rephrase it.

Q. You made reference to certain studies which indicated that the primary purpose of most visitors to the park was passive recreation, is that correct?

A. That's correct.

Q. Is there anything in those studies which tells you that First Amendment activity has become so loud or so pervasive that usage of the park overall has been reduced?

A. There is nothing that says that. However, one of the things in the user study that was done was that the bandshell in particular was not managed by the Parks Department. Now, the Parks Department clearly saw as a result of this study that management was necessary there, direct hands-on management that hadn't been there previously.

Q. Did you have occasion to employ a person as a consultant regarding sound at the Central Park bandshell, the Naumburg Bandshell?

A. Yes.

Q. What was it that you asked that person to assist you in doing?

A. Although I have produced special events, I am (458) not a sound expert, and I wanted someone with a bit more experience to assist me in finding companies that were both quality companies who had worked outdoors, familiar with park systems, and had a good inventory of equipment to provide for all the various groups we were going to have at the bandshell.

Q. Did you ask this consultant to advise you on ways to limit the spread of sound from the bandshell?

A. I spoke with our consultant that we wanted to have sound at the bandshell on the concert ground, that general area. However, we also felt that beyond the concert ground area and into all the other areas surrounding that area we wanted to see how we could, in a real quality way, keep it in this general concert ground area.

Q. Is that a yes?

A. Rephrase the question. I mean, what—

MR. FOSBINDER: Could you repeat the question?

THE COURT: Read it back.

(Question read)

A. Yes.

Q. Thank you. Did you receive suggestions from the consultant on ways that the spread of sound could be limited?

A. Yes.

(459) Q. And what were they?

A. Essentially, they were employing some of the different sound firms that we were looking at.

Q. Were there any more specific recommendations, such as speaker placement, type of speaker, type of amplification?

A. Well, I was familiar myself with one type of speaker placement, where you get it up over the crowd and come down, and I remember discussing it with the sound consultant. However, I don't know what his opinion on that—I believe his opinion was that that perhaps may be more effective but it would be extremely costly.

THE COURT: Was that consultant Mr. Gary Floyd?

THE WITNESS: That's correct.

Q. Do you recall any other suggestions that the consultant made regarding the problem?

A. I can't think of anything right now.

Q. At any point during the period last year when New York Sound provided the sound did you make measurements at the Central Park West property line?

A. At Central Park West?

Q. Yes.

A. I am not certain. We had the Department of Environmental Protection out for a couple of events that New York Sound had done the sound for. They did (460) measurements. I don't know if it was particularly Central Park West. I know they went to some different points in the park, but I am not certain about Central Park West as a specific location.

Q. Do you have any specific knowledge that would tend to prove that New York Sound could achieve a better ratio of sound at the bandshell to sound at the Central Park West line, for instance, than RAR did?

MR. PINES: Your Honor, I object to the form of that question.

THE COURT: Overruled. The witness may answer.

A. Well, I am considering it. It's a very difficult question to answer. One of the concerns that we had is we're not presenting one event there on one date.

Q. Did you conduct any tests, did you engage in any studies, did anyone make any measurements that would tend to support the claim that New York Sound had a better ratio, that is to say, it was louder at the site and quieter at the Central Park West line, for instance, than Rock Against Racism?

A. We had the Department of Environmental Protection both at the Rock Against Racism event and also at a couple of other events.

Q. Did they make measurements at the back of the crowd at both events?

(461) A. I believe they did.

Q. Did they make measurements at some determined point farther away than the back of the crowd?

A. I believe they did.

Q. Do you know what the results of those measurements were?

A. I would have to take a look at the specific study.

Q. Do you remember if RAR's ratio of sound at the site to the sound at some other distance away was worse than the group hired by the City of New York?

A. I believe it was.

Q. Do you remember how much?

A. I can't—decibels, off the top of my head, I couldn't say.

Q. Do you know where the sound was measured?

A. I would have to look at the study. I believe—

Q. Is there a study?

A. I believe they took measurements both at the back of the bandshell—

Q. Is there a study?

A. There is a preliminary report.

Q. Okay.

A. If I could answer your previous question—can't do that? Okay.

MR. FOSBINDER: Just one moment, your Honor.

(Pause)

MR. FOSBINDER: That's it. No more questions at this point.

CROSS-EXAMINATION

BY MS. LIBERATORE:

Q. How long have you held your present position with the Department of Parks?

A. January 27—it was the Monday—of 1986.

Q. Were you employed prior to commencing your employment with the Department of Parks?

A. No.

Q. What kind of work did you do?

A. Prior to that? Prior to that I was both a performer and also a consultant for special events.

Q. What kind of performing did you do?

A. I worked—

MR. KINIGSTEIN: Objection, your Honor.

THE COURT: No, I will take it, see what the witness' background is.

A. I worked in a number of situations, primarily as a clown and as a mime, a juggler. I worked in schools, theaters, parks, auditoriums, all kinds of different performing arts facilities.

Q. Would you describe your work as a consultant?

(463) A. Yes. Primarily I worked with either corporations or municipalities on creating special events. It could be a music concert, it could be a multifaceted performance series, it could be a series of workshops. All different kinds of events.

Q. Did you work for the City of Grand Rapids, Michigan?

A. Yes, I did.

Q. Would you describe your work for that city?

A. Grand Rapids, Michigan had malled off an outdoor street in their downtown area and they were trying to create some kind of festive atmosphere there. So they contracted with me and I created a series called City Celebration. It was a series of about 40 different events that would happen on different days called City Celebration, matinees on the mall, and there was music, there was theater, there was dance, all kinds of different events.

Q. And it was your job to coordinate—

A. I created everything from, you know, choosing the groups to actual on-site responsibilities for sound, you know, moving vehicles in or out or making sure everyone was fed or all the different kind of activities like that.

Q. Did you have any experience with audio technology during the years prior to your work with the Parks Department?

(464) A. I worked at a radio station in Detroit, Michigan, WABX, which was—it was a rock and roll radio station, and I both produced special public—public affairs and also did news there. I was a news broadcaster and as such I had a pretty good amount of experience with audio technology, though not as an engineer per se, but as a technician.

Q. Would you describe your general duties and responsibilities as a program director for the bandshell?

A. Yes. It's my job to coordinate, process permits for the public use of the bandshell, also to program it. Last year we had a series called Summer Stage of different events, music, dance, theater. I oversee all kinds of—the sound permits, vehicle permits, do on-site negotiations with people, arrange anything—any of the details that are necessary for a successful event there.

Q. Do you know if there was any management of the bandshell area before your position was created?

A. No. There was no direct manager there.

Q. Could you briefly describe the process an applicant went through in order to secure a permit to use the bandshell area before your position was created?

A. It was a bit problematic because someone would apply at the Manhattan borough office of special events, then they would—for a permit application. They would (465) have to get a sound permit somewhere else. Oftentimes they would have to get vehicle permits somewhere else. And in all cases the office of special events was a clearing house for paper but didn't necessarily and I don't think in any case did on-site work, which was one of the things the Parks Department sought to remedy, to consolidate much of this, and also to have an office that was actually there at the event, because—you know, it's a little difficult if you're just processing paperwork to know what really goes on out in the field.

Q. Did the creation of your position affect the process you were just describing?

A. Yes. We—when I say "we"—the department sought to make this a bit easier on people and also to establish some guidelines, so people clearly knew what was expected and also what the Parks Department would attempt to provide, and to that end they established my office under the visitor service section of the Central Park administration.

What we did, we took the permit procedures from the Manhattan borough office and I took those on along with the vehicle permits, along with the sound permits, so that everything could come out of one office.

Q. Do you know what percentage on average of the special events permits issued for Central Park involve the (466) use of the bandshell in one manner or another?

A. Half, 50 percent of the total.

Q. How many are there total?

A. Total in Central Park I believe are about 330, 340 permits.

Q. And approximately half involve using the bandshell?

A. Yes. I think it's upwards of 160, 175, something to that effect.

Q. Given those numbers, do you know how the level of usage of that area compares to the level of usage of other park facilities in New York City?

A. It's the most used facility in the five boroughs.

Q. Do you know how the number of events drawing large crowds at the bandshell compares to the number of such events at other park facilities in New York City?

MR. KINIGSTEIN: Objection.

THE COURT: Yes. Define large crowds.

Q. Do you know how the number of events drawing crowds in excess of 1000 people at the bandshell compares to such events at other facilities in New York City parks?

A. It's the largest one drawing in excess of 1000.

Q. Do you know how the bandshell is designed acoustically?

A. It was built in 1923 as an acoustic bandshell. (467) It's kind of a hexagonal shape, limited stage area, which is why the department has built a stage extension, but it's designed as an acoustic shell.

Q. When you assumed the position as program director for the bandshell do you know if there were any rules whatsoever that governed the use of that area?

A. There were no site-specific rules that governed that area.

Q. How did the administrator at Central Park administrate the use of the bandshell before your arrival?

A. Well, in all honesty, there was next to no management there, there was next to no administration. That's one of the problems that both public users had and also the department had.

Q. How would that cause a problem for a public user?

MR. FOSBINDER: Objection. This is sort of hearsay about hearsay about hearsay. This witness wasn't even here when all this was going on.

THE COURT: No, but—

MR. FOSBINDER: I am just not sure how he is qualified to testify about any of this.

THE COURT: I do think what he can tell me about the conditions before he came on the scene is rather limited, that is, a limited ability. If you wish him to describe how his own administrative responsibilities give (468) assistance in these matters I will permit that.

MS. LIBERATORE: Your Honor, I would submit that his knowledge with respect to what rules existed at the bandshell area is relevant to his state of mind when he was codifying or drafting the guidelines at issue in this suit.

MR. FOSBINDER: If I could have a word.

THE COURT: Look—

MR. FOSBINDER: This is a central point to us. I have attempted to elicit from Mr. Killian who it was who told him about a great number of problems which he has allegedly been solving and he has been unable to provide the name of a single individual. Now he is being asked to testify at even greater length about problems that existed and this is something that I would love to cross-examine whoever contended that there were problems and I am not able to.

Mr. Killian wasn't there, doesn't actually know anything, who even told him what. That's the whole point of cross-examination and I am not getting any opportunity to do it at all.

THE COURT: He wrote the rules, so I understand.

MS. LIBERATORE: Yes, he did.

THE COURT: He is in a position to testify as to what concerns he thought he was addressing in the rules. I will permit him to do that. If the objection is that he (469) should not be permitted to testify to those points, I overrule it. There may then be further cross-examination triggered by such testimony, but I will permit this line of inquiry.

MS. LIBERATORE: Thank you, your Honor.

BY MS. LIBERATORE:

Q. I think it's been your testimony that there were no real codified rules to govern the bandshell before your arrival, before you assumed the position of program director?

A. That's correct.

THE COURT: How do you know that, sir?

THE WITNESS: Well, it was clear in interviews with people that—there were discrepancies in people's stories over what went on and what the permit said or who did what, when and where, and clearly many of the people had not been at the events, only they had heard from a section foreman, "Hey, did you hear what happened on Saturday?" So there wasn't a lot of—there was no written information that was site specific. There were general park regulations, but there were no—there was nothing in writing about use of the bandshell.

THE COURT: Did a time come when someone asked you to undertake crafting the first draft of use guidelines for the bandshell?

(470) THE WITNESS: Oh, that was from the initial interviews I had for the position. One of the things they sought was direct management, but they also saw a need for some guidelines for use of it, some parameters. But that was from the very early initial interviews.

THE COURT: All right. Go ahead.

Q. Could you describe what your understanding was as to the difficulties associated with the fact that there were no codified rules to govern use of the bandshell before your position was created?

A. It made it difficult for the department to discern what groups were using the facility to their best advantage and what groups were taking advantage of the department. It was difficult, without a set of guidelines specific to such a well-used facility, to get any sense of parameters, of what was allowed, what was not allowed, what the department could effectively manage and what it couldn't manage. In fact, there were situations where the department was literally in over its head and could not manage certain events because there were not guidelines for that facility.

Q. When you assumed your position as program director did you do anything to address the problems associated with this area?

A. I first began by, again, interviewing a host of (471) people within the department.

Q. Why were you conducting these interviews?

A. Well, I wanted to ascertain what problems actually were there and what was truly happening there, what discrepancies there were, identify problem areas and see how we could solve those.

Q. And how did you anticipate being able to solve the problems?

A. Well, by drafting a set of guidelines, I felt that people would be given an outline to work from, and then they could point-by-point go through the steps necessary to have a successful event there.

In all honesty, we're trying to service groups. I mean, one of the difficulties is most of the people who use the bandshell are not producers, they are independent, they are ad hoc, whatever, and they come to use the facility and they don't know about sound or they don't know that we have no bathrooms there. They just don't know. So what we're trying to do is service them by saying here are the kind of things you're going to need to know about, here are the things that the department requires, and you can go to this office and get it done.

Q. Did you use any knowledge that you had acquired as a performer and a director of musical events in the past in drafting the proposed guidelines?

(472) A. Well, I knew generally—when you produce an event you know the general things, sound, light, seating, if there is a back stage area, bathrooms, those kind of general things. I mean, I used my experience to bring forth to the area.

Q. In addition to utilizing the knowledge acquired in your other positions, what other references, if any, did you use in preparing the guidelines?

A. I'm sorry. Could you say that again?

Q. You have just testified that you used knowledge that you had acquired previous to coming to the Department of Parks when you were drafting the guidelines. What other references did you use when you were planning to draft the guidelines?

A. Well, for instance, I spoke to not only people within the department but I also spoke to people in Brooklyn who produce events there at the Prospect Park Bandshell. The particular organization is called Celebrate Brooklyn, and they produce I think

about 40, 45 events each year, and they have a similar facility. I also spoke with the special events director in Brooklyn, the assistant—the former assistant special events director in the department, I spoke to—of course, Ron Cianciulli, Kate Pearson, Bob Russo, all gave me input to the drafting of these guidelines.

(473) Q. Aside from individuals you might have discussed the proposed guidelines with, did you use any records or reports?

A. Yes. I went through all of the previous years—I think it was the previous three years—special event permit applications, and I went also through a number of reports that had been filed on various groups who used the facility.

Q. I believe when Mr. Fosbinder was examining you you discussed usage reports concerning Central Park.

A. Yes. I also looked through—there was a user survey done, which was conducted by the Central Park administration, and also a general survey conducted by I believe it was the City University of New York Graduate Center, which studied use patterns through the various parts of the park, and also there was an extensive report written on the management and restoration of the park, and I studied that report, because as a result of that report my position was created. So I was trying to again get the idea what the department was trying to do at the bandshell.

Q. After your discussions and other research did you ultimately draft use guidelines for the bandshell?

A. I did.

Q. Were those guidelines promulgated by the Department of Parks?

(474) A. They were.

Q. Do you know approximately what date they were promulgated?

A. They were signed by the commissioner on May—excuse me—March 21, 1986.

Q. This is a six-page document that has now been marked as Defendants' Exhibit F. Do you recognize that document, Mr. Killian?

A. Yes, I do.

Q. Would you tell the court what it is?

A. These are the use guidelines for the Naumburg Bandshell in Central Park that I drafted.

Q. Is the document marked for identification as Defendants' Exhibit F an accurate copy of the use guidelines currently applicable to the bandshell?

A. Yes.

MS. LIBERATORE: Your Honor, I offer these into evidence.

THE COURT: Yes, I receive them. Actually, they form a part of the joint exhibit, Exhibit 1.

MR. FOSBINDER: I would object.

THE COURT: You would? All right. State your objection.

MR. FOSBINDER: The objection is that in between insurance and vehicle on page 4 something has been crossed (475) off.

THE COURT: The witness says that the document now before me as Defendants' Exhibit F for identification are the regulations currently in force.

Is that your testimony, Mr. Killian?

THE WITNESS: Yes, sir.

MR. FOSBINDER: I thought he said these were the ones promulgated on that date in 1986. I just want to make sure that the record reflects—

THE COURT: Quite right. Are they offered as the regulations currently in force?

MS. LIBERATORE: Yes, your Honor.

THE COURT: Is there objection to that offer?

MR. FOSBINDER: No.

THE COURT: Then I receive it.

(Defendants' Exhibit F for identification was received in evidence)

BY MS. LIBERATORE:

Q. Mr. Killian, let me direct your attention to page 4 of Defendants' Exhibit F.

A. Yes.

Q. There is an area that is blackened out on that page, is that true?

A. That's correct.

Q. Could you explain what originally was in that (476) place?

A. Originally there was essentially a ban on posting of handbills and distribution of literature.

Q. Could you explain why it's now blackened out?

A. In the—prior to this year, in I guess it was late April or early May of last year, when we were in the same situation we currently are before the court, we were advised by counsel to strike that, and that's what I have done ever since.

Q. So it was at that time that this provision was stricken from the guidelines?

A. That's correct.

Q. As the program director of the bandshell, have you ever applied the provision concerning the distribution of literature to any users of the bandshell?

A. No, we haven't.

Q. To your knowledge, has that provision concerning distribution of literature ever been applied against any users of the bandshell?

A. Not to my knowledge.

Q. Do you know whether the provision concerning distribution of literature currently is in effect?

A. There is nothing in effect regarding distribution of literature. We have stricken it from the use guidelines and that's the extent of it.

(477) Q. If you know, do you know why that language hasn't actually been removed from the guidelines as opposed to just stricken out?

A. To be honest, I didn't understand the procedure. On the advice of counsel last year, he said this should be stricken, and since then that's what we have done, we have either whited it out or crossed it out, in similar fashion that it appears here.

Q. Have you learned since then of any other procedure?

A. Well, yes, I have. I didn't understand it at the time, that there was a procedure, some sort of public record that we have to go through to do that. I didn't understand that. I am not a lawyer.

Q. To your knowledge, has the formal procedure been put into place or—

A. It has started, yes.

Q. Eliminating from consideration the provision concerning distribution—

THE COURT: Before you move on, if tomorrow, Mr. Killian, you receive an application for a special event and in responding to that application you wish to send the applicant a copy of the

bandshell guidelines, what sort of document would you send to your applicant?

THE WITNESS: This is what I send out, as this (478) is, xeroxed with—

THE COURT: As this is?

THE WITNESS: Yes, that's right.

THE COURT: You send them a xerox with the blackened area?

THE WITNESS: That's correct.

THE COURT: All right, fine.

THE WITNESS: This is how it goes out.

THE COURT: All right.

Q. Eliminating from consideration the provision concerning distribution of literature contained in the use guidelines, do the rest of the use guidelines apply to all sponsors of events at the bandshell regardless of the type of event or expression presented there?

A. Yes, they do.

Q. In drafting these guidelines was it your intention to in any way limit or restrict the type of events that were performed at the bandshell?

A. No, not the type of events.

Q. What was your intention in that regard?

A. Our intent was to continue to reflect the great diversity of New York City and to, again, service as many different groups as we could. At the bandshell, because of the volume of applications we receive and the number of events we have, we try to create some broad guidelines that (479) would be applicable to all of these groups, and that's what we have done.

Q. Do the use guidelines for the bandshell contain a provision governing the regulation of sound amplification within the bandshell?

A. It does, the guidelines do.

Q. Could you briefly describe what that provision involves?

A. The provision requires users to use a Parks Department vendor who provides a sound system.

Q. As the primary author of the use guidelines, could you explain why you included a sound amplification provision in those guidelines?

A. Well, there were problems with, again, groups who were using the facility who weren't familiar with either outdoor sound or perhaps they had employed someone who—

MR. FOSBINDER: Your Honor, I object again. After extensive cross-examination, he has been unable to identify a source of this information, and given that he can't tell us who said it to him, he wasn't there at the time, I am at a loss as to how he is competent to testify about it.

THE COURT: He is competent to testify about what motivated him. That I will permit.

(480) A. That was one problem. An additional problem was noise levels from various groups using the facility, complaints both from park users and also nearby residents.

Q. What factors did you take into account in deciding that the sound level at the bandshell as opposed to the type or the quality of sound should be controlled?

A. We took into consideration a number of things. One was we wanted to be certain that whoever was providing sound out there was a quality sound company, that they were familiar with outdoor work and they could take into consideration the number of factors for containing sound to the concert ground area, and

that may be weather, it could be foliage on the trees, all kinds of conditions like that.

Q. You have mentioned that one of the problems that prompted you to draft this provision was the noise issue, the sound level issue.

A. Yes.

Q. Focusing on that issue at this point, what factors led you to consider a sound amplification provision for the bandshell?

A. Complaints. Park user complaints was the primary reason, nearby residential users' complaints, in addition to the fact that the number of events that are held there—you know, when you're holding 100 events or more or hosting up to 160 events you receive a great volume (481) of complaints.

MR. KINIGSTEIN: Objection, you Honor.

THE COURT: At the time you drafted these regulations had you personally received any complaints about sound level?

THE WITNESS: I had looked through the records.

THE COURT: Tell me what you did in that regard.

THE WITNESS: In that regard, there is a number of—the police keep a log of any sound complaints that have been received, letters that were received, and I simply went through those. I did not go any further than that, however.

THE COURT: And as you can best remember today, what sort of information did that inquiry develop which then had an effect upon the working of your own mind?

THE WITNESS: It seemed to be, in discussion with people in the department, that sound levels were continuing to bleed out beyond the concert ground area for many events. They were just simply going into other areas of the park. And that seemed to be a great concern to the department, because most of the phone calls

centered around that. They centered around "I am over here on the other side of the park and I can't even enjoy—you know, I can't sit here, relax," whatever.

Q. The physical location of the bandshell area (482) within Central Park, did that influence you to try and control the sound level within that area?

A. Well, the bandshell is in the heart of the park, and if you look at the design, the way Olmsted and Vaux designed it is you would walk up this mall, this promenade, and you would spill out onto the concert ground, and as such you would then go possibly to Rumsey Playground, possibly to Sheep Meadow, or you would be drawn up to Bethesda Terrace. I mean, we call it the heart of the park because that is where the majority of people are. They are somewhere between 56th ad 72nd between Fifth Avenue and Central Park West. That's where the bulk of our users—if they are not there, they pass through there, and that's a great concern of ours.

Q. You have mentioned when Mr. Fosbinder was examining you the location of Sheep Meadow in relationship to the bandshell.

A. Yes.

Q. Did that influence your concern about sound level?

A. Absolutely. Absolutely. Sheep Meadow is one of—a real area that people flock to, especially on the weekends, especially on a good day. People enjoy sunbathing there and relaxing. That was a real consideration.

(483) Q. Do you know approximately the distance between the bandshell area and the Sheep Meadow?

A. From the back of the concert ground, which would be the west side of the concert ground, I would guess it's 100 yards, maybe 150 yards.

Q. Did I interrupt you?

A. No, no.

Q. Do you know if there are any Department of Parks regulations or rules aside from the use guidelines that relate to sound levels or to noise within the park?

A. Yes, there are rules—there are general New York City Department of Parks rules and regulations.

Q. Mr. Killian, you have testified that you reviewed phone logs form the Police Department—

A. Yes.

Q. —any complaints that were generated with respect to sound prior to your coming to the Department of Parks?

A. Yes.

Q. Did you review the logs themselves?

A. They have—if you go to the Police Department, they have a log. While it gives you the name and address, it's just a brief notation.

Q. You looked at those specific reports, you didn't just rely on what people at the Parks Department told you?

(484) MR. KINIGSTEIN: Objection.

THE COURT: Yes?

MR. KINIGSTEIN: I objected, your Honor.

THE COURT: So you did. Why?

MR. KINIGSTEIN: It was leading, I thought.

THE COURT: I will take the answer.

A. Yes, I looked at them specifically.

Q. When you read those complaints about noise, did that have any effect on your drafting of the use guidelines?

A. Well, clearly it identified a problem of noise at the bandshell.

Q. This is, I believe, a 12-page document. Could you identify what has been marked as Defendants' Exhibit G?

A. These are the City of New York Parks and Recreation rules and regulations.

Q. Is this an accurate copy of the general Parks Department rules and regulations that are presently in effect?

A. Yes it is.

MS. LIBERATORE: Your Honor, I offer Defendants' Exhibit G into evidence.

THE COURT: Is there objection to the offer?

MR. KINIGSTEIN: No.

THE COURT: Received.

(Defendants' Exhibit G for identification was (485) received in evidence)

BY MS. LIBERATORE:

Q. Do you know if Defendants' Exhibit G contains a provision relating to unreasonably loud sound?

A. I believe it does.

Q. Can you locate that provision and state the page and section number in Defendants' Exhibit G where it appears?

I just realized that this document doesn't have any page numbers. So you have to just count pages.

A. It's—I am guessing—page 6, section 15.

Q. Section 15 is I think sufficient. Would you read the provision that relates to—

MS. LIBERATORE: Could I have a moment, your Honor?

THE COURT: Yes.

(Pause)

MS. LIBERATORE: I withdraw the question, your Honor.

THE COURT: Very good.

Q. It's been your testimony that these general Parks Department rules and regulations contain a provision concerning unreasonably loud sound or excessive noise?

A. That's correct.

Q. Were you aware of this provision when you were (486) drafting the use guidelines for the bandshell?

A. Yes. Yes, I was.

Q. Did you take it into account at all?

A. Absolutely. It's a concern of the parks that Central Park and that general area, again, be an area people wish to come for passive recreation, also assemblies and concerts and whatever. But that they would generally be in that concert ground area. So noise was a real factor and I based much of the use guidelines around these regulations and around that noise regulation in particular.

Q. You have discussed the factor of sound quality within the bandshell as opposed to just the sound level.

A. Yes.

Q. Do you know if there is any relationship between the use or the failure to use proper amplification techniques and the level of sound?

A. Yes, there is a great deal—a great relationship there.

MR. FOSBINDER: Objection.

THE COURT: The ground?

MR. FOSBINDER: He appears to be testifying as an expert and he is not an expert in the area of sound amplification.

MR. LIBERATORE: Your Honor, I submit, given his experience as a producer of amplified events, he could (487) certainly have the sense, if not an absolute scientific explanation, he certainly has a sense concerning sound levels and proper amplification.

THE COURT: I am not at all sure I can permit him to testify as an expert. On the other hand, he retained an expert. You may ask him as to what was in his mind on these various aspects when he drafted these particular regulations.

Q. At the time that you drafted the use regulations, Mr. Killian, did you consider the relationship between sound level and proper amplification at the bandshell?

A. Yes, I did, quite a bit.

Q. Could you explain in what way?

A. Oftentimes groups that use outdoor—if they are not familiar with outdoor—even if they are, they will use loudness and simply a loud decibel level to make up for—they may not be able to mix the sound very well and yet they feel that they can turn it louder, and excessively loud, that that makes up for it, and they try and, in a certain sense, override the mixing.

MR. FOSBINDER: Objection.

THE COURT: I will permit. You can pursue it on cross if you like.

MR. FOSBINDER: Thank you.

Q. Did you find that there was any relationship (488) between lack of proper amplification and perhaps too low a level of sound?

A. Prior to drafting of the guidelines I didn't have specific examples of that. However, last summer, when, you know, I was at 90-some percent of the events, that was the case.

Q. Did the factor you described about poor amplification and higher sound levels than perhaps were appropriate influence you when you were drafting the provision concerning sound amplification?

A. Yes.

Q. How did it influence you?

A. We were looking for a way that we could provide quality sound and yet sound that did not bleed over into other areas of the park, and it seemed to be that there had been vendors who were doing a poor quality job, and one of the ways they were doing a poor quality job perhaps is turning it as loud as it could go rather than doing a proper mix.

THE COURT: Prior to taking on your present responsibilities you did have no personal observations or bases for that, true?

THE WITNESS: True.

Q. The provision concerning sound amplification in the use guidelines, does that provide that the Department (489) of Parks contract with a private sound company to provide sound for events held at the bandshell?

A. That's correct.

Q. Did you consider other possible ways to address the concerns about sound level and sound amplification at the bandshell?

A. We considered other options. One option is negotiating with each group individually, attempting to agree on a decibel

level. Another option is having the public user bring in their own sound system but we provide the technician. And then the third option seemed to be getting an independent vendor to provide sound, someone with extensive experience in all phases of music and dance and theater to provide sound. We eliminated the first two options primarily based on practicality and went with the third option.

Q. Why did you believe it impractical to hire a technician to work on sound equipment provided by private sponsors?

A. Most technicians prefer to work with equipment that they are familiar with, either that they own or that they have worked with extensively. It is rare that a technician will come into a facility that they have never worked, use someone else's equipment, and then promise to put on a good show. If they do, I think it's rare when you (490) get a good show.

Additionally, were we to do that I think it would be difficult, not only because they are not familiar with it but because they would be just unclear with the whole setup of the bandshell and how it worked and how it amplified music.

Another option was identifying a decibel level. But that from my reading of previous DEP reports and also with different groups that the Parks Department had worked with seemed to be impossible to enforce, you know, because picking out a decibel level, be it 70, 75, 80, 90, whatever you want to pick, is very, very difficult when you're out there on the day of the event because you have a lot of different factors that play in regards to temperature, foliage, whatever. So the third option seemed to be the most viable.

Q. Did the Department of Parks consider buying a sound system?

A. Purchasing one was considered. However, to have a large enough inventory and also to have a vehicle, the personnel, the storage, the insurance, seemed prohibitive on our first year out,

especially because sound equipment when purchased should be for that site. What works on one site necessarily won't work the best on another site.

The department felt that this was our first year (491) in attempting to do this, let's see what works best, and to that end we contracted with an outside consultant. He made a recommendation. We took the recommendation and we saw what kinds of equipment we needed, what we didn't need, what we would purchase perhaps in the future.

The other thing is the department assumed no liability for that equipment. For instance, if a microphone goes out, it wasn't our responsibility to run and go get another one, but it was that outside vendor's.

Also, you have to have a very large inventory when you're doing the number of events we're talking about. If a tape deck goes you've got to have backup tape decks, or if a digital relay unit goes you've got to have backup for that. You have to have storage and you have to have some assurance that it's not going to be stolen.

Q. After the decision was made to contract with a private sound company what steps did you take in reaching or finding an appropriate sound company?

A. Well, I contacted Gary Floyd, a sound consultant, and he assisted in getting bids from different groups and also drawing up essentially a menu of what our basic needs were, and then the sound companies bid with the various equipment they owned or they would recommend. I believe it was a total of between five and seven bids that were ultimately collected and that he reviewed.

(492) THE COURT: Before you get into the details of that I want to put one question to you on the prior subject, which was the use guidelines and the particular function played by the vendor, the sound vendor.

THE WITNESS: Yes.

THE COURT: In the proposed conclusions of law that I am asked to adopt by the city in this case, Mr. Killian, paragraph 6 says this:

> "The guidelines seek to regulate sound levels without reference to speech content through a requirement that all sponsors use the sound amplification equipment and professional staff retained by the department for all bandshell events."

My question is in what manner do the requirements of equipment and staff operate to regulate sound levels. What is the connection there?

THE WITNESS: Those staff members are actually at the board mixing and listening to it, setting up the equipment, all that, but in terms of regulation, in terms of mix, most sponsors chose to elect someone from their own group to say "Hey, we need a little bit more on the bass or we need a little softer here, a little stronger here." Those people would be at the mixing board with the vendor's technician advising them.

What we sought to do was to reflect as much as (493) possible the users' wishes for their sound mix while at the same time attempting to regulate that bleed into other areas of the park.

THE COURT: Fine. That's responsive to what I had in mind. Let me follow it up with another question.

In the event that a disagreement broke out between the sponsor of the event and the vendor's professional staff as to sound level, who controls that, whose hand is on the button, so to speak?

THE WITNESS: I can give you an example. And I can say that the actual sound technician's that we employ or contract with hand is on the button. But, for instance, a case in point is the New York Grand Opera. I was at the back of the concert ground. The sound was very soft. However, their person at the mixing board

prefers it that way. I personally would have boosted it so that the people there could hear it, hear it a bit more effectively. However, their person at the mixing board chose not to do that. However, it is our vendor who we employ whose hand is actually on the dial. But that—you have to separate I believe volume from mix.

THE COURT: I am talking volume now.

THE WITNESS: It is the vendor's hand that is there. However, in all events, you've got a group, you've got a person from that group saying "I need a little more (494) here, I need a little bit more there," and you're constantly monitoring. It's not that you set it on 5 and that's agreed upon.

If more people arrive, more bodies are absorbing sound, you have to bring the level up a bit. If there are more people there perhaps you have to bring the level up a bit. It's a great sensitivity and it's a relationship between a delegate from that sponsor and also the technician. In the end, though, that person is our contractor.

THE COURT: Fine. Thank you.

BY MS. LIBERATORE:

Q. Did you give Mr. Floyd, your consultant, any instructions with respect to his way of evaluating the different companies that had submitted bids?

A. I gave Mr. Floyd just general guidelines, that I wanted somebody with outdoor experience, good quality reputation, and also a good inventory, and I wanted to make sure they could do the number for events we were talking about. Many sound companies are one or two people and a van and I wanted to make sure they could do an entire season without breakdown.

Q. Was price among the most important factors considered in this evaluation?

A. Price was one factor. Quality and inventory was (495) the primary factor.

Q. Did Mr. Floyd ultimately recommend a sound company as his first choice?

A. Yes.

Q. Do you know what company that was?

A. New York Sound.

Q. Do you know why New York Sound was selected as the number one choice?

A. New York Sound was selected because they had the best equipment in Mr. Floyd's eyes. They had the most extensive state of the art equipment and they had the most backup and they had extensive outdoor experience.

In addition, all things considered, they had what I would say is the lowest bid. If you look at it strictly bottom line, there was one vendor who came in slightly under New York Sound. However, New York Sound offered a very good rain date policy that—and also they offered a per diem price rather than a per event price, which made their bid the lowest bid.

Q. Did you ultimately select New York Sound as the company?

A. Yes.

Q. And was your selection based on Mr. Floyd's recommendation?

A. Yes, it was.

(496) Q. Did New York Sound in fact provide the sound amplification system for the bandshell—

A. Yes.

Q. —in '86?

A. Yes.

Q. Was there any event held at the bandshell in 1986 in which New York Sound did not provide the sound amplification system?

A. There was one event.

Q. What event was that?

A. Rock against Racism.

Q. Was New York Sound also hired to provide sound amplification for the events that the Parks Department itself produces at the bandshell?

A. Yes.

Q. After you had selected New York Sound as the company to provide sound in 1986 did you contact the private sponsors who had put in applications to use the bandshell for the 1986 season?

A. Yes, though I had already contacted many of the private sponsors previous to the actual selection on New York Sound.

Q. What was your purpose in contacting them?

A. Well, we had a tech requirement form that they would fill out and they would say, you know, "I need X (497) number of microphones, speakers, amplifiers, I need a reel-to-reel deck or I need a cassette deck." Just so that we could then give that to the sound vendor and they could say, "Okay, May 21, I need to have two tape decks, one reel-to-reel and X number of microphones out there."

Q. So before you informed them that New York Sound would be the sound company you informed them that under the use guidelines they would be required to use a sound company provided by the Department of Parks?

A. That's correct. At the time the guidelines were completed we still hadn't collected—Gary Floyd hadn't issued a recommendation. So we knew the general bids, I had seen the

general bids. but he hadn't evaluated point by point all of the equipment.

Q. Did the private sponsors voice to you any kind of reaction when they learned that the use guidelines now required them to use a private company selected by the Department of Parks?

A. Across the board, I think everyone was concerned.

Q. What was the nature of their concern?

A. When you're doing outdoor events the thing that it all hinges on is your sound amplification, your sound reproduction. So every group was concerned. They didn't know what kind of equipment they were going to be getting, you know, and—they just didn't know.

(498) Q. Did any private sponsors who had previously expressed an interest in having an event at the bandshell decide not to have an event because the guidelines required all sponsors to use the Parks Department sound company?

MR. KINGSTEIN: Objection, your Honor.

THE COURT: I will take the answer. My preference, gentlemen, is that when one attorney starts off with a witness he sees it through. So I will hear from Mr. Fosbinder in connection with this witness.

I will overrule the objection. You may answer.

A. Not to my knowledge.

Q. Do you know how many amplified events were held at the bandshell in 1986?

A. It was in the range between 50 and 60, I believe.

Q. Could you describe the types of events that were held throughout the 1986 season?

A. We had every kind of event almost possible. We had public users who had speeches, we had poetry, we had opera, we

had dance, we had theater, we had jazz, we had new music, we had new composers, we had children's performances, we had groups—many, many different ethnic groups from throughout New York City.

Q. Did any of the private sponsors of events at the bandshell in 1986 ever complain to you that the level or quality of sound provided by New York Sound was inadequate (499) for their event?

A. No.

Q. To your knowledge, did any private sponsor of an event in the bandshell in 1986 express to any other official at the Parks Department any dissatisfaction with the level or quality of sound provided by New York Sound?

A. No.

Q. Mr. Killian, it's been your testimony that before these private sponsors had events at the bandshell they expressed concern.

A. Yes.

Q. But after their events had taken place at the bandshell did any of those companies, private sponsors, rather, express concerns again?

A. No. Actually most were pleased. I know at least in one case the group went out and employed New York Sound for another event. But everyone was concerned.

Using, for instance, the New York Grand Opera as an example, their concern is to have the best sound on the concert ground. They had been using a sound vendor for a number of years that in essence they had personally trained and for them to give over the authority to the Parks Department made them very nervous, because they live and die on sound reproduction. But they were extremely pleased with the sound system, as were such diverse groups as the (500) permit that's here. I know that the Fourth Wall Repertory Theater was pleased, as were other groups.

MR. FOSBINDER: Objection. This is hearsay.

THE COURT: The witness may testify as to expressions of satisfaction or dissatisfaction that were made to him personally.

Does that qualify, Mr. Killian? Did you receive some of these comments yourself, personally?

THE WITNESS: Personally, yes. All the comments I am now speaking of I received myself.

THE COURT: Expressions of state of mind or satisfaction the witness may testify to.

A. I think it's normal—

THE COURT: There is no question before you.

THE WITNESS: Excuse me.

Q. To your knowledge, did any of the private sponsors of events at the bandshell in 1986 hire New York Sound to provide sound amplification for events that they held at other times—

A. Yes.

Q. —or at other locations?

A. Yes.

Q. Did you attend any of the privately sponsored amplified events held at the bandshell in 1986?

A. Privately sponsored—I attended almost the (501) entire season of events at the bandshell last season.

Q. Approximately how many events would that be?

A. Total, probably somewhere around 100, perhaps more.

Q. Were all those events amplified events?

A. No. There were some acoustic events, there were some dance events without amplification. So it varied.

Q. At the events that you attended that were put on by private sponsors did you observe any interaction between the private sponsors and the sound technicians employed by New York Sound?

A. Yes.

Q. Do you know what the nature of those interactions were?

A. The private sponsors would basically designate one person to be at the mixing board and to say to the technician at the board what their preference on sound quality was.

Q. What effect if any did the private sponsor's interaction with the New York Sound technicians have on the sound generated by New York Sound at their event?

A. I think New York Sound tried to reflect the sponsors interest as best as possible.

Q. Did you or anyone else with the Parks Department or the Police Department get involved in any way with the (502) adjustments being made by New York Sound to accommodate the requests of private sponsors concerning the quality of sound?

A. Well, occasionally I would intercede and say it's a little soft in this area, perhaps you need more bass or less bass, you know, because I would be walking the perimeter of the concert ground throughout the event. When you're at the board itself it's difficult to find out what's at the back, what's behind you. But those were suggestions.

Q. Were your suggestions controlling in that area?

A No.

Q. Was there any interference by city employees in the relationship or the interaction between the New York Sound technician and the private sponsors when it came to tone or quality of sound?

A. Not to my knowledge.

Q. What instructions if any did you give New York Sound technicians regarding sound amplification at the bandshell?

A. I gave New York Sound a basic set of instructions that we wanted the best quality we could get there, that they could produce there, the best mix possible, to provide whatever equipment the sponsor essentially needed to produce that event, and that we had a concern for (503) containing the sound in the concert ground area and where possible to control bleed into the outside areas.

Q. When you say that you were concerned about the quality of sound at the event, if the events were provided by private sponsors would the Department of Parks' determination of quality of sound be the governing determination?

A No.

Q. Who was it left to then?

A. That's left to the sponsor.

Q. What was your purpose in attending the events at the bandshell in 1986?

A. Well, to be an effective manager I think you have to be there. My purpose was to observe as many events as I possibly could, as many diverse events as I could, and to collect and gather information so that I could form an accurate portrait experientially myself.

Q. While you were at those amplified events did you monitor the sound level at the events?

A. I would say that I was very aware of the sound level. I did not personally monitor the event with a decibel meter.

Q. I am not talking in scientific terms. Did you stand in one place during these events, did you pay any attention whatsoever with respect to the sound?

(504) A. Yes, yes.

Q. What did you do in monitoring that sound level in that way?

A. Well, the first responsibility is to see what the mix is, and when you speak, of the mix you're talking of the relationship of the instruments to each other and the instruments to the vocals, if there are any, and you want to make sure that people are not hearing drums or bass excessively over other instruments, and you listen for that, you make sure that vocals can be heard, and you monitor that.

In my case, I would also walk around to other areas. I would walk back to Sheep Meadow, what we call Mineral Springs, Cherry Hill, the dead road area, down the mall to 65th Street, and see how much bleed or bounce there was on a given day.

Q. Did you take any action during any of these events that affected the sound level itself?

A. I suggested at a few events that the sound level be raised because I didn't think that it was—it could be heard throughout the concert ground area or was too soft in some areas.

Q. And that was just a suggestion on your part?

A. That's correct.

Q. Do you remember if the sponsors—I think you (505) have already testified that the Grand Opera in fact did not want the sound level raised.

A. That's correct. They had their own reasons for a softer mix and that was simply respected.

Q. Did you ever suggest that the sound level was too loud or too high?

A. There were occasions when the sound level was too high, and I think it's a situation where you have someone at a mixing

board and they can't hear it in other areas of the park. You know, you simply go to the sponsor or you bring the sponsor out to that point and then we go to the board and change it.

Q. Did you observe as New York Sound set up its sound equipment for the bandshell events that you attended?

A. I observed the setting up.

Q. Do you know how many vehicles New York Sound used to transport its equipment to the bandshell?

A. One van.

Q. Do you know how long it took New York Sound to set up its sound equipment at the bandshell?

A. Approximately 45 minutes to an hour.

Q. Did you observe the manner in which New York Sound attached its sound system to the source of electricity at the bandshell.

A. Yes, I did.

(506) Q. Could you describe how that hookup was done?

A. It's done through through three tails, what are called tails, out of the main electric box. They are large cords that are fused to 100 amp fuses. There is a tail that comes out and you simply hook another tail in and there is a large rubber overlay.

Q. And New York Sound utilized these tails you're describing?

A. That's correct.

Q. I would like to direct your attention to the Rock Against Racism permit application for 1986.

MR. LIBERATORE: Do you have it? It's plaintiff's Exhibit 102, I believe.

THE COURT: How much more do you have, Ms. Liberatore? It's not that I want to curtail you in any way, except that I must hear another matter in chambers.

MR. LIBERATORE: It will probably be at least another 25 minutes.

THE COURT: We will have to break off then. You are available tomorrow morning, are you not, sir?

THE WITNESS: Yes.

THE COURT: That is a leading question that I am entitled to.

We will be adjourned until 9:30 tomorrow.

(Adjourned to 9:30 a.m., March 31, 1987)

* * *

(507) (Trial resumed)

JOSEPH KILLIAN resumed.

THE COURT: Counsel may continue.

CROSS-EXAMINATION CONTINUED

BY MS. LIBERATORE:

Q. Mr. Killian, yesterday you were testifying about times during the 1986 season when you would escort private sponsors to the periphery of the bandshell area to monitor the sound level at their events.

A. Yes.

Q. Could you describe the process that you went through with private sponsors in more detail, please?

A. Well, generally, once an event is under way we need to alter the mix to please the sponsor depending on the group, depend-

ing on their instrumentation. Oftentimes, (508) if it's a musical group, from song to song they will change their instrumentation, possibly adding drums or different horns or whatever the case is. We will also be adding microphones.

I then take the sponsor and we walk them to three or four sites on the bandshell, first on the concert ground and then on the periphery, so that they are assured that there is a good mix and they are assured of the quality. At that time they also tell me if they like any adjustments made.

Now, sometimes we walk with the technician, sometimes not. Sometimes we will just go back to the mixing board and they will give their instructions directly to the technician. It depends, again, on the sponsor and how concerned they are about sound. Quite honestly, some sponsors are concerned less than others.

Q. That's as concerning the mix or the sound quality in the bandshell?

A. That's correct.

Q. With respect to the sound level, you testified concerning taking sponsors out to the periphery to monitor that level.

A. That's correct.

Q. Would you describe that more?

A. Again, we're on a walking tour of a couple of (509) different points throughout the bandshell. It's very personal in that sense, where if we're on the dead road, which is just beyond the concert ground or beyond that—

Q. Is that location on this map, on Defendants' Exhibit A?

A. Yes.

Q. Could you point it out, please?

A. On this map it's actually called Center Drive, but we refer to it as the dead road because—

THE COURT: The dead road, you say, sir?

THE WITNESS: That's correct.

THE COURT: Show it to me again.

THE WITNESS: Right here. The concert ground is here. The road is closed, which is why we refer to it as the dead road.

THE COURT: That's not an acoustical phrase?

THE WITNESS: No, it's not. It is a vehicle phrase.

Q. The dead road is the Center—

A. Center Drive.

Q. And that's on the left side of this map, is that true?

A. Well, you have Sheep Meadow right here. This is Center Drive or the dead road. Here is the bandshell. This is the concert ground.

(510) Q. Let me give you a pen to mark the area. Take this red pen and mark the area that you're referring to as the dead road.

A. That's this area here, this entire road.

Q. Just put a C there.

(Witness complied)

Q. You would take private sponsors out to the dead road area for what purpose?

A. To identify essentially not only the mix, but at that point essentially how loud the volume is. I also take them to different points on the concert ground nearer to the bandshell, but that's—that particular area, again, what we call the dead road, or as called on this map, Center Drive, is where the roller skaters skate, it's also where the volleyball players are, there are trick bicyclists there. That area, if you can hear sound at that level, essentially you're beyond the concert ground.

Q. Can I just back up a moment. Why do you refer to it as the dead road?

A. It's referred to as the dead road because it's closed to vehicles.

Q. So you would take a sponsor out to the dead road and you could hear the concert at the dead road area. What action would you take at that point?

A. Well, again, sometimes you will have bleed there. (511) So it would be discussed with the—when I say bleed, bleeding of sound. We recognize that that's going to happen, depending on weather and other conditions. But essentially I would discuss it with the sponsor and we would say "I think it's excessive," and in most cases they would agree or disagree, and we would go back to the technician.

Rarely, though—most sponsors are most concerned with sound on the concert ground, because that's where their audience is, and it's—I can't even think of an instance where there was any kind of disagreement at that point along the dead road. Certainly within the concert ground and within the audience parameters there is always discussion, and in all those situations it's deferred to the sponsor to make the judgment in those cases.

Q. So it's your recollection today there were no disputes between yourself and sponsors when you took them to an area like the dead road to monitor sound level?

A. That's correct.

Q. I also want to go back to another issue that you discussed in your testimony yesterday. In your experience, if sound at a musical event is improperly amplified does that create any type of audience reaction?

A. It always does. Audiences are always complaining. They are upset, they are disturbed by the (512) sound. Either they can't

hear, possibly it's too loud, possibly they can hear too much of one instrument and not another.

THE COURT: That's just the point. What did you mean by your question, Ms. Liberatore, improperly amplified in respect of mix or in respect of sound level?

MS. LIBERATORE: I am referring to not the sound level. I am talking about the method through which amplification is done within an outside bandshell type area.

THE COURT: You're talking mix, not level. All right. The witness may answer that, although I am not certain how pertinent that is to this inquiry. You may answer, sir.

A. Again, it is—in most cases, even though the Parks Department may not be sponsoring an event, we receive the complaints, and complaints are quite natural for groups that—if the sound is bad they complain. When I say bad, primarily I am speaking of the mix here. It's uneven or too soft in some areas, too loud in other areas.

Q. In your experience, has the audience in that type of situation ever become disruptive?

A. I think there is a potential for that. We did not at our concerts last year have any disruptive experiences, at ones that we sponsored or ones that we provided the sound for. I think there is certainly the (513) potential for that.

MS. LIBERATORE: I would like Plaintiff's Exhibit 2. I have a copy of it.

MR. KINIGSTEIN: You want the one that I showed you yesterday?

MS. LIBERATORE: Yes, the 1986 permit application.

MS. LIBERATORE: It's Plaintiff's Exhibit 1.

Q. Do you recognize what is Plaintiff's Exhibit 1?

A. This is an application filed by James Fosbinder, the attorney for Rock Against Racism, for an event to be held in 1986.

Q. Is there a line in that application that refers to the number of vehicles?

A. Yes. The number of total vehicles here is listed as 23.

Q. Would it cause the Department of Parks any concern if 23 vehicles were permitted to travel through Central Park on a weekend day in the spring or the summer?

A. Yes.

Q. Why would it cause concern?

A. Well, the first thing one must understand is that all of our park drives are closed to vehicles on weekends from—generally it's early April to after the New York City Marathon. As such, park users take up the (514) entire width of the lanes, either runners, bicyclists, again, joggers, skateboarders, and they really don't expect to see traffic, they don't expect to see vehicles at all.

It's also problematic because on a given day there are more events in the park. Some of those involve running races, bicycle races, marathons, many jogging things.

So that the drives are already in use and vehicles are very dangerous. There is a high rate of incident of people being injured in the park by vehicles. People drive on the drives assuming that they are just on a normal street and they are just driving through New York and they don't expect to encounter as many people as they do basically covering the drive.

So vehicles pose a real problem for us in terms of getting them in and parking them and providing for the safety of other park users.

Q. Do you know what type of information the Department of Parks requests from a private sponsor before issuing a permit for a vehicle?

A. Yes.

Q. Would you describe that type of information?

A. The basic information the department requests are the owner of the vehicle, the vehicle identification number, the license plate, color, make, year and model of (515) the car. Then on the vehicle permit we also put the agreed upon entrance, the agreed upon exit, if there is to be parking or not parking, and how many hours the vehicle may be there to unload or load. That's the essential vehicle permit.

Q. Do you know why that type of information is requested?

A. That information to the department is essential in case of injury, in case someone is injured, in case there is any safety problem, in case a vehicle is abandoned, concerns like that, if someone is to be hit.

Again, it happens quite frequently in the park, where there are these altercations or near altercations. We feel it's our responsibility to know who the vehicles are and what they are doing. That extends to delivery vehicles, you know, delivering hotdogs to the vendors, all vehicles like that. Especially the concern is on weekends, because that is when we have the most park users in the park and the drives are closed all day.

Q. If a private sponsor was to indicate to you that they were going to use a rented vehicle would that change the type of information the Department of Parks would request from that private sponsor?

A. Well, as much as possible, we request the same information. However, in the case of rented vehicles, (516) obviously they don't know the specific vehicle they are going to be getting that Saturday morning or that Friday evening. So we request the owner of the firm, the manager and a phone number, so if it's a rental vehicle we know who—at least what firm was providing it

and a manager that we can call so we can ascertain who is responsible for the vehicle if there are any problems at all.

Q. Would you explain how the information that the Parks Department requests with respect to vehicles is helpful in the event or necessary in the event of an injury?

A. Well, we can identify the vehicle immediately, we can identify the owner and the vehicle ID number, so that it limits the case of potential hit-and-run accidents, things like that. That's been the case and that's just a concern, to protect park users.

Q. Let me direct your attention to the Rock Against Racism event at the bandshell in 1986. Were you present at that event?

A. Yes, I was.

Q. Did you observe the Rock Against Racism sponsors set up the sound equipment for their event?

A. Yes, I did.

Q. Do you know approximately how many vehicles Rock Against Racism used to transport their sound equipment to the bandshell in 1986?

(517) A. I believe they used for sound equipment alone two vehicles.

Q. What types of vehicles were used, if you know?

A. They had a tractor-trailer rig, essentially a flatbed trailer with a canvas covering, and also a school bus.

Q. Does it concern the Department of Parks when private sponsors use a vehicle such as a tractor-trailer?

A. Well, a tractor-trailer is—first of all, it can be a difficult vehicle to drive in the park because of the way the park drives and the roads are created. If you look on the map, the methods of access and egress for vehicles are all curved, they are all broken, and the drives themselves are not that wide.

Additionally, park users don't expect to see tractor-trailer trucks in the park. You've got—I don't know the exact size of their truck, but it may have been a 40-foot bed. I'm not certain. It causes—it just increases the potential danger to people in the park. It's also a difficult vehicle to park.

THE COURT: Are the defendants going to argue that this vehicle was brought on contrary to permit?

MS. LIBERATORE: No, your Honor. We're trying to establish—

THE COURT: Then why are we hearing all this? (518) Permission was given for it. That's an end to it. Let's move on.

Q. How does the type of vehicle used by Rock Against Racism to transport their equipment compare to the vehicle used by New York Sound?

A. New York Sound uses one van.

Q. Let me direct your attention to Plaintiff's Exhibit 1 again.

A. Yes.

Q. Does the application indicate how many hours Rock Against Racism requested to use the bandshell area?

A. On this application they are requesting to use the bandshell area from 4 a.m. to 4 a.m., and in parentheses they have written 24 hours.

Q. Does the application also indicate the number of hours of actual performance time Rock Against Racism requested?

A. It's listed as 12 noon to 10 p.m.

Q. Would it concern the Department of Parks if it was to grant a permit application that requested a total of 24 hours of bandshell use?

A. Yes.

Q. Why?

A. To use the facility we require management there at all times. So you're talking about 24-hour on-site (519) management, which in the view of the Parks Department is excessive. In all cases, with exception to this particular application, general setup time is allotted as two hours, both before the show and after the show. 24 hours in the view of the Parks Department to have a crew on and to have a staff for that time is simply excessive for a performance event.

Q. Do you know at what hour the representatives from Rock Against Racism arrived at the bandshell area before the scheduled noon event in 1986?

A. I believe it was on or about 6 a.m.

Q. Do you know approximately how long it took Rock Against Racism to set up for their event?

A. I can say that they were not ready for performance till I believe it was 12:30, 12:45 in the afternoon. Whether they spent the entire time setting up is debatable. But it was a period of from 6 in the morning to 12:30, 12:45.

Q. How does the amount of time Rock Against Racism used to set up their event in 1986 compare to the amount of time New York Sound would have used or did use in other events of the size of Rock Against Racism?

A. Generally, two hours is what is given. Of that, the sound company needs approximately 45 minutes to one hour to set up, and then we have a one-hour preparation (520) time, what we call sound check time, so that they can meet with the band, make sure everything is miked correctly and then they can start on time.

Q. Did you observe the manner in which Rock Against Racism attached their sound equipment to the source of electricity at the bandshell?

A. I observed how it was connected. I did not actually observe the connection.

Q. Could you describe the way it was connected?

A. I went in and looked in the electrical room and they had directly wired their sound system to our box. In effect, they were getting direct power without being fused. They went by our tails. So potentially there was nothing to fuse—the amps that we have were not fused and there was nothing to fuse in case of overuse of electricity, there would simply be a fire.

Q. Does it make a difference whether you utilize the tails, as you are describing, in the electrical unit as opposed to hooking right into the unit?

A. The tails are a safety factor. They are fused as in a home, though they are fused at a higher rate. They are fused at 100, as opposed to a home rate, which might be 15 or 20. So in the case of overuse of electricity you would blow a fuse. In this case, since they went directly into the box, there is no fuse to blow, and what happens (521) next is a fire.

THE COURT: What would catch fire, New York City or the equipment?

THE WITNESS: Well, the equipment primarily, and then from there, of course, it depends on how extensive the fire was and how quickly it was put out. When I say the equipment, the equipment coming from the box.

Q. How does the manner in which Rock Against Racism attached its equipment to the electrical source at the bandshell compare to the method used by New York Sound at the same bandshell?

A. Well, as I said, by going into tails it's a safety factor, so you're fused.

Q. And New York Sound used the tails?

A. That's correct.

Q. From the Department of Parks' perspective, are any problems created when private sponsors seek to use Park Department facilities with which the sponsors are unfamiliar?

A. Well, it poses many problems, because people, even if they have used the facility before, perhaps are not familiar with electrical hookups, perhaps they are not familiar with the backstage area, perhaps they are not familiar with the entire staging, and I think that there are some danger elements involved. And then there are many (522) operational kind of concerns that we have also.

Q. Selecting one sound company to provide sound at the bandshell, did that address any of those problems?

A. No, it alleviates a number of problems. The more familiar a sound company is with the electrical system and the outdoor concert ground and the shell itself the better sound they can provide each time. There is a consistency factor.

It also alleviates many headaches on the part of the Parks Department because then you have someone who knows the facility and you don't always have to be reeducating both the technicians and the performers to that particular facility. They know how to tie into the electrical system, they know what its capacities are, and they know what the needs on the concert ground are.

Q. After the Rock Against Racism event in 1986 did any complaints come to your attention concerning that event?

A. Yes.

Q. Could you describe the nature of those complaints?

A. There were a number of letters that had been written regarding sound level on that particular day and there were a number of phone complaints also.

MS. LIBERATORE: I would like to have this correspondence marked as Defendants' Exhibit H, H1, 2, 3 (523) and 4.

Let me just indicate that they are all copies except for one, the first letter that Mr. Killian is going to be looking at.

Q. Do you recognize those correspondence that have been marked as Defendants' Exhibit H?

A. Yes, I do.

Q. Could you describe what those correspondence relate to?

A. Generally, these all relate to the Rock Against Racism concert of 1986.

Q. Do you remember when those correspondence that have been marked as Defendants' Exhibit H first came to your attention?

A. They came to my attention, you know, a matter of days after the performance.

MS. LIBERATORE: Your Honor, I offer Defendants' Exhibit H in evidence.

MR. FOSBINDER: I am not going to object.

THE COURT: I receive them.

(Defendants' Exhibits H 1-4 for identification was received in evidence)

Q. Could you just indicate the addresses from which those correspondence were sent, if they are indicated at all?

(524) A. Yes. One was sent from 80 Central Park West, one is 101 Central Park West, 10 West 66th Street, and also an additional one from 10 West 66th Street.

Q. Do those correspondence indicate why they were complaining about the Rock Against Racism event?

A. It appears that they were complaining regarding the volume level of sound.

Q. Do they indicate that they were complaining about the content or the type of music?

THE COURT: They speak for themselves. I will read them.

MS. LIBERATORE: Very well. Thank you, your Honor.

Q. Has a private sponsor ever suggested to you that an exception to the sound level regulation be made for their event because it is presented for only one day?

A. That's the general attitude of most sponsors, I think.

Q. What is your response to that suggestion?

A. My response is that if we were only having one concert at the bandshell in the summer I think we could make exceptions. However, we don't have one concert there, we have many concerts, we have many amplified concerts. So it's not an inconvenience to park users for one day but it rather represents a summer-long inconvenience. I feel if (525) we grant an exception that everyone is open to that exception, and then we multiply all of our complaints 50 fold or 60 fold, depending on the number of amplified dates.

MS. LIBERATORE: This is Defendants' Exhibit F I am going to put before the witness.

Q. Let me direct your attention to page 2 of the use guidelines that have been marked as Defendants' Exhibit F.

A. Yes.

Q. Do the guidelines require that a private sponsor at the bandshell pay a fee to use the Department of Parks-provided sound system?

A. Yes, it does.

Q. What is that fee?

A. The user fee is $100 per performance hour plus a one-hour sound check is charged.

Q. When you selected New York Sound as the sound company that would provide the sound system for the bandshell in 1986 did you come to some sort of understanding with that company concerning the cost of its services?

A. Yes.

Q. Could you describe that understanding?

A. The understanding essentially was we would guarantee them—when I say "we," I mean events sponsored (526) or cosponsored by the Parks Department—a minimum of 50 performance dates.

Q. And in exchange for that guarantee what did New York Sound—

A. They would provide two technicians, all of the setup, you know, liability, all the inventory, and complete services in regards to whether we needed a 16-channel board, 24-channel board, 32-channel board, if we needed a mix from the stage and a separate mix from the concert ground that would be provided, and that was the essential agreement, that they would provide all of our sound needs for this fee. In addition, we worked out a policy regarding rain dates and if we should have two events in a day, how that would be charged, things like that.

Q. Do you know what the cost was to the Department of Parks for the season for New York Sound having provided the amplification?

A. Well, when we include the private concerts and we also include the events that were cosponsored with the Central Park Conservancy, I believe the total bill was somewhere between $24,000 and $26,000.

Q. Was this cost for the entire season considered reasonable by the Department of Parks?

A. I think it was a very reasonable fee.

Q. Did Mr. Floyd give you any opinion with respect (527) to the fee that was going to be charged?

A. Mr. Floyd felt it was a very good fee considering not only the number of show but also the quality and extensiveness of equipment they were providing, in addition to the fact that they were providing two technicians for each concert. And again, they were assuming liability, and insurance, repairs, delivery, and storage of the equipment.

Q. Does the $100 per hour sound system fee set forth in the guidelines bear any relationship to the cost to the Department of Parks for the sound system provided by New York Sound?

A. It's close, depending on the event. But it's fairly accurate.

Q. At the end of the 1986 season did you do a calculation comparing the amount of money received by the Department of Parks from private sponsors with respect to the performance fee and the amount of money that the Department of Parks paid New York Sound for the privately sponsored events that they provided sound for.?

A. Yes, I did.

Q. And what did that calculation demonstrate, if anything?

A. The Department of Parks lost money. It was a differential of a few hundred dollars. We almost broke (528) even, but we did lose some money.

Q. Has it been your testimony—

THE COURT: Tell me in detail what you did, Mr. Killian. What mathematical or accounting procedures did you go through to arrive at that bottom-line conclusion?

THE WITNESS: The $100 or—

THE COURT: No, no. What you just told me, that you lost a few hundred. Tell me what you did to arrive at that calculation.

THE WITNESS: We simply tallied how much we paid New York Sound and how much we received in and there was a difference of a few hundred dollars. New York Sound would essentially pay us on a purchase order—we would work a purchase order with them and then we would pay it out and oftentimes if a group was only using it for an hour or two hours we would be paying much more to New York Sound than we would be receiving from the private sponsor.

THE COURT: All right. Thank you.

BY MS. LIBERATORE:

Q. When you say that you compared the amount of money that Department of Parks paid New York Sound, did you consider all the money, even the money that Department of Parks paid for events which it sponsored at the bandshell?

A. I'm sorry.

Q. All right. Let me rephrase it.

(529) A. Yes.

Q. You did a calculation based on how much money the Department of Parks paid New York Sound?

A. Yes.

Q. In doing that calculation did you consider all the events at which the Department of Parks—

A. Yes, yes, even the events we cosponsored with the Central Park Conservancy.

Q. In doing the calculation to determine whether you lost money or made money from the private sponsors paying you did you consider even the events that the Department of Parks sponsored itself?

A. Yes, yes. Now, those—the ones that we cosponsored, again, that the cosponsorship was with the Parks Department and

the Central Park Conservancy generally paid the sound fee for those, and they just paid it at the full rate.

Q. I believe yesterday you testified that all the private sponsors, with the exception of Rock Against Racism, used New York Sound—

A. That's correct.

Q. —in the 1986 season?

A. That's correct.

Q. Did they all pay the $100 per hour performance fee?

(530) A. No.

Q. Do you remember how many private sponsors did not pay that fee?

A. I believe two did not.

Q. And why didn't those private sponsors pay the fee?

A. One was a dance company from Vancouver, Canada, and they were coming to the United States on a tour and they simply wanted to perform at the bandshell, but they didn't have the money to pay for the sound system. They obviously were paying their own way to come to New York City to do a performance. But they requested that the fee be waived because they were taking on so many costs and they couldn't pay it.

In another event—

THE COURT: And was in fact the fee wavied for that company?

THE WITNESS: That's correct.

THE COURT: All right. Go ahead.

A. There was another group that couldn't pay the fee. I believe it was Theater For A New City. What we did there, since we

were getting a per day fee from New York Sound, not a per event fee, and the Central Park Conservancy and the Department of Parks were sponsoring an event later in the day, we simply put Theater For A New (531) City on stage beforehand, and I believe—I am not certain the entire fee was waived. I believe they may have come up with a partial payment.

Q. To your knowledge, has the $100 an hour performance fee ever resulted in any private sponsor being excluded from using the bandshell?

A. Not to my knowledge.

THE COURT: I suppose the visitors from Vancouver would have been excluded had you not waived it, correct?

THE WITNESS: I am certain they would have been excluded, yes. That's why they requested the waiver.

THE COURT: Yes.

Q. Is that also why the Department of Parks gave them the waiver?

A. That's correct. And the same is true in the case of Theater For A New City.

Q. In drafting the use guidelines did you include any provision relating to the hour or length of performances that could be held at the bandshell?

THE COURT: Before we pass on to that, let me put this to you, Mr. Killian. Based on the actions you have told me that you took with respect to the Vancouver group and the Theater For A New City, would it be correct for me to infer that the department has a policy of waiving (532) the user fee if the applicant demonstrates an inability to pay or would that not be a fair inference for me to draw?

THE WITNESS: I think that would be a fair inference, yes.

Q. Do you remember the question I asked?

A. Excuse me. I don't.

MS. LIBERATORE: Do you think the reporter might be able to read it backwith respect?

THE COURT: Read it back?

(Question read)

A. Yes, we did.

Q. Could you locate that provision in Defendants' Exhibit F?

A. It's on page 2, under the heading Hours and Dates of Use.

Q. Would you briefly describe what that provision says?

A. Essentially what the provision says is for a performance event we allot two hours with a pre-setup time of two hours and a post-takedown time of two hours.

Q. And with respect to festivals, does it provide anything?

A. Festivals—and I quote here—"Festivals may be permitted between 12 p.m. and 6 p.m."

Q. Does it also provide anything with respect to (533) morning amplification of sound?

A. Yes. We request that amplification—music not be amplified until noon.

Q. Why did you include that, that specific provision, in the guidelines?

A. Well, generally it's in deference to nearby park residents and also park users. Morning hours tend to be hours people want to come to relax and enjoy the serenity of the park. At noon I think it's a bit more accepted for music and other events to begin.

Q. Are you familiar with any studies concerning the use of Central Park in the morning hours?

A. Yes, I am.

Q. What do those studies demonstrate, if anything?

A. It's a much higher percentage of people who come to use the park for what we generally refer to as passive recreation. Again, that's walking, strolling, general relaxation, resting.

Q. Did you consider the studies in drafting the guideline which generally prohibits amplified sound before—

A. Yes. Yes, I did.

Q. Why are festivals permitted between the hours of noon and 6 p.m. at the bandshell?

A. Well, the department certainly recognizes that there is a need for multiperformance events. I think (534) festivals are very unique in New York City and we enjoy those and we enjoy hosting those. The six hours though is used as a guide because you need a minimum of, you know, two hours before and two hours after. So you're looking at, for park staff, a ten-hour day.

Additionally, after 3 o'clock or 3:30 in the afternoon we have much, smaller work crews, much smaller, much reduced cleanup crews for the entire park. So it's difficult to clean up and it's difficult to restore the area to the shape it was prior to the festival.

Q. Why aren't the festivals permitted to go beyond 6 p.m.?

A. The primary reason is we needed to come up with a time that we felt over an entire season long we could effectively manage the facility. Were we to extend it even an hour or two hours we then have difficulties with not only staffing, but I think it gives everyone the right to request one or two hours. So we're not just extending one hour but potentially we're extending 50 hours or 60 hours or 100 hours, depending on the group, how many other groups continue to request longer hours. So we had to design a

time and a format that we felt was a fair parameter for music and theater and speech expression.

Q. Do you know if the level of complaints concerning sound level at the bandshell events bears any (535) relationship to the length of time of the event?

A. It does.

Q. Could you explain what that relationship is?

A. Generally, the longer the event, you will see a rise in complaints. It seems that park users and residents are tolerant for one and a half, two hours, two and a half hours, and somewhere around three hours the complaints begin to increase, and when it's a full-day event of six hours, after that the complaints rise, I think primarily because people have heard it so long, you know, they have heard the festival so long, and it's, you know, utilized that the part of the park for such an extended period of time.

THE COURT: Do you base that answer, Mr. Killian, in part, at least, on your experience during the 1986 season's events at the bandshell?

THE WITNESS: During 1986, yes.

THE COURT: Is it fair to say then you received some complaints about sound in respect of events other than Rock Against Racism?

THE WITNESS: Well, we received some phone complaints, not particiarly in regards to sound, but in regards to when is that event going to be over, you know, how long is that going to go on, those kind of concerns.

THE COURT: All right. Thank you.

MS. LIBERATORE: Could I have a moment, your (536) Honor?

THE COURT: Yes.

(Pause)

Q. The provision that you were just looking at in Defendants' Exhibit F, does it also limit the number of hours of evening performances?

A. On page 3 it states "Evening performances are permitted under certain circumstances. Evening events must be finished by 9:30 p.m."

Q. Why is there a limit on the number of hours a performance can be put on at the bandshell in the evening hours?

A. Well, we have some of the similar concerns that we have—that I have already stated for festivals in regard to limited crews at night to clean up. Additionally, for a nighttime cleanup you've got to bring in light trucks, so that you can see the garbage that's out there, whatever litter garbage is there.

Primarily, we needed to design a time where we felt we could comfortably have performances and still have good relations with the neighborhood and the community boards, and that seemed—the 9:30 seemed to be a fair time, considering that oftentimes a group will go over a little bit, and then there is also the two-hour post performance time. So when we say 9:30 we're talking about (537) our staff being there until 11:30 at night.

Q. Did you compare the amount of litter that's generated at a six-hour festival in the day as to that that's generated in an evening performance of two, two and a half hours?

A. Yes.

MR. FOSBINDER: I object to that. Surely the size is of some consideration or that question is meaningless.

THE COURT: Are you assuming groups of comparable size?

MS. LIBERATORE: Yes, your Honor.

THE COURT: All right. Then rephrase the question to include that element.

Q. If you compare a six-hour performance during the day at which a specific number of participants are involved and an event in the evening at which the same number of participants is involved, is the amount of litter generated any different, to your knowledge?

Withdrawn, your Honor.

In your experience, do daytime festivals draw the same number of people as evening performances at the bandshell?

A. It will vary by the popularity of the group. Generally festivals in the day—generally they will (538) attract more people, I think primarily because there are more people using the park at those hours and they just tend to draw better, you know.

Q. In your experience, does the number of people who are drawn to an event at the bandshell affect the amount of litter that's produced at an event?

A. Yes, generally, that's true.

Q. Does the length of time an event is going on at the bandshell bear any relationship to the amount of litter that will be generated at the event?

A. Yes.

Q. Could you describe what the relationship is?

A. Generally the relationship is—if it's a two-hour event there is a turnover of crowd, and I can't really state why, but when people are there for six hours they tend to stay, they have lunch there, they may have a snack there, they may have dinner there. It's been an all-day event, so they generate more of a pile of litter than a simple lunch.

It's also different than performance events, where it's just a two-hour thing and people are coming, they have eaten before or they perhaps plan on eating afterwards, but not during the event.

That's the main problem. I think ratio-wise it's substantially much higher for a six-hour event, it's (539) not merely three times the amount of a two-hour event, but it's substantially higher than that.

Q. When you're referring to the two-hour event that you have just described are you referring to evening performances?

A. I am referring—yes, a two-hour event, be it evening or be it afternoon.

Q. Are there food vendors in Central Park?

A. Yes.

Q. Do you know at what hour those food vendors enter the park?

A. Well, at the bandshell we will have two to three vendors have concession permits to be there. They come and go generally at their whim. They don't have to be there a set number of hours. However, usually, as was the case last summer, they are gone from the area by 4:30, 5 o'clock, you know, they are out of there.

Q. So there is less food for sale in the evening hours in the bandshell area or in Central Park generally?

MR. FOSBINDER: Leading.

THE COURT: Sustained as to form.

Q. The fact that food vendors leave at 4 or 5 o'clock, as you described, does that have any effect on the amount of litter generated in the park of at the bandshell in particular?

(540) A. Yes.

Q. Could you describe what the effect is?

A. Basically, if no food is being sold there is limited garbage, there is limited litter—that's most of the garbage—unless there is a program handed out or fliers, leaflets that are on the ground. But generally it's all food oriented.

Q. Do the use guidelines contain a provision with respect to insurance?

A. Yes.

Q. Would you locate that provision in Defendants' Exhibit F?

A. It's on page 4.

Q. What does that provision require?

A. Essentially, as it says here, "The city must be named as additional insured on liability and property damage policies. The city must be the sole party insured on the fire and extended coverage policy."

Q. You don't have to read the whole thing.

A. Essentially, it's an insurance policy that we need to see for an event.

Q. In practice, under what circumstances does the Department of Parks require a private sponsor of an event at the bandshell to provide insurance?

A. If a private sponsor anticipates they will have (541) more than 1000 people, either as spectators, performers, in attendance we request insurance.

Q. So as a general matter, if the private sponsor indicates that there will be less than 1000 participants at their event no insurance will be required of them?

A. That's correct, unless previous experience states otherwise.

Q. In the situation where insurance is required, do you know in what amount the insurance is required?

A. It's citywide. It's a $1 million to $3 million policy.

Q. Is this amount uniformly required throughout the Department of Parks in New York City?

A. As I understand it, it is.

Q. Why does the Department of Parks require a private sponsor of an event to provide insurance to cover that event?

A. In most cases, the department has little input upon the actual nature and direction of the event and in such a way we're hosting events that we essentially have limited control over. Therefore, we have no idea what problems are going to anticipate that may arise. So to protect ourselves if someone is injured or if there is any kind of accident, things like that, we request an insurance policy.

(542) Q. Of the privately sponsored events that took place at the bandshell in 1986, what percentage did the Department of Parks require to provide insurance?

A. Percentage. It's a small percent. I think—it's a small percent. I think there is maybe seven or eight groups.

Q. Of those groups that were required to provide insurance, how many actually did provide insurance?

A. I believe with the exception of one, all the other groups provided insurance or riders to the policies.

Q. And which group did not provide insurance?

A. Rock Against Racism.

Q. Do you know why only a small percentage of private sponsors were required to provide insurance for their events at the bandshell?

A. Well, again, it goes by the numbers, and while we have a large number of events, many sponsors anticipate less than 1000.

Q. Let me direct your attention to page 2 of Defendant's Exhibit F. Is there a processing fee charged under the use guidelines for each special events permit application filed with the Department of Parks?

A. Yes.

Q. What is that fee?

A. The fee as stated here is a minimum of $50 with (543) a maximum of $100.

Q. Do you know what the range is?

A. If a sponsor on their application predicts attendance of between 1000 and 3000 I believe $50 is charged, from 3001 to I believe it's 4000 they are charged $75, and above 4001 they are charged $100.

THE COURT: I am sorry. Which provision is this, what page?

THE WITNESS: Provision 1 on page 2, under permits, the special event permit, the processing fees.

THE COURT: I see. All right.

Q. Are those the only three amounts charged, 50, 75 and 100?

A. To my knowledge, yes.

Q. Could you describe the process through which special events applications for the bandshell are considered and evaluated by the Parks Department?

A. After I receive an application, within the department what I do is make copies of that application, circulate them to all of what we call our operations meetings people. Again, that's the

director of special events, the director of maintenance and operations for Central Park, the Manhattan borough special event office, the Urban Park ranger or the Urban Park Services and the Park Enforcement Patrol, the New York City Department of (544) Police, what we call the North Meadow, which is our communications center, the Central Park administrator, and in my case, a copy goes to the section two foreman, which is the section that we're in in the park, for maintenance and operations.

Q. After the application is circulated what action, if any, does the department take?

A. It depends on the application. We have operations meetings weekly throughout the season, generally from February through the end of September, where we discuss all of the applications that come in, not only the bandshell applications. If it is a proposed larger event or a unique event we will set up meetings with the sponsors and we will go through all of their needs, what we need to provide. Perhaps we need to provide more barriers or benches or we have to bring in special vehicles.

Additionally—those will usually be one or two, three meetings sometimes. Then we will always try to do what we call an on-site meeting with the sponsors, where we actually walk them to the site, they look at the bandshell, they look where the vehicles are to be parked, they look at where we're going to put benches, and possibly they have a different configuration of benches they want or different configuration of barriers. So it's a total of a couple of meetings that we will have to have with them. If it's a (545) large event we may have to include other city agencies in it also.

Q. In general, is there a correlation between the size of a proposed bandshell event and the amount of planning that the Parks Department has to undertake?

A. Yes.

Q. Could you describe what the correlation is?

A. Well, again, if it's a simple event, and usually a performance that is two hours, I will, again, circulate copies. I will also speak with the sponsor, perhaps I will meet with the sponsor directly, and at an operations meeting I will announce it, and as long as Ron Cianciulli and John Purvis or someone from recreation has signed the permit, then it will be approved, with limited discussion, sometimes none at all.

If it's a large event, then more people are involved. We may need to involve William Dalton from New York Urban Park Services, we may need to coordinate rangers, we may need more sectional people brought in to provide more barriers, cleanup, and in all cases we try to have as many people at all of the meetings as possible so that everyone understands what their duties and responsibilities are before the event and during the event, and then there is the on-site meeting or perhaps sometimes more than one on-site meeting.

(546) Q. When you say the larger the event, what do you mean, large in what way?

A. Large, primarily we're speaking of anticipated attendance, though it may be a large event too if it's a long event.

Q. Could you estimate what percentage of your time is spent in the application and planning process for the bandshell events?

A. That's difficult to say. It's a high percentage, dealing with the paperwork and the negotiation with the sponsor and then the negotiations within the department. Oftentimes there will be another event going on in the park at the same time, and so we'll have to negotiate within the department of how we can get more security or more people to work the event. So a great deal of time is spent for events just doing that kind of legwork.

Q. Do you have any idea what percentage of time other Parks Department employees spend in this process?

A. In regards to the bandshell?

Q. Yes.

A. It's difficult to say, because for all of that—those eight or handful of events there is a real extensive amount of involvement from various departments within the agency. On smaller events it's primarily my working with the director of maintenance and operation and the sectional (547) foremen.

Q. Do the use guidelines contain a provision relating to anticipated number of participants and the use of the bandshell?

A. Yes.

Q. Could you find that provision in Defendants' Exhibit F?

A. It's on page 3, under Attendance.

Q. What does that provision provide?

A. Essentially, we are requiring groups to host events of less than 3000 in attendance.

Q. Why was 3000 selected as a cap, if I may refer to it as that?

A. I think it's fair to refer to it that way. It's simply statistically looking at the concert ground and seeing how much room bodies need and multiplying it out, and then in addition how much we can manage in terms of cleanup and crowd size.

So the concert ground, we feel 3000 is a fair level for attendance. If groups anticipate they are going to draw larger than 3000 we try as much as possible or I try to refer them to other departments within the agency where we can accommodate that larger number of people.

Q. Let me go back to the application fee for a moment.

(548) A. Yes.

Q. Has the application fee, to your knowledge, ever resulted in any private sponsor being excluded from using the bandshell?

A. Not to my recollection.

Q. If a private sponsor were to indicate to you that it was unable to pay the application fee would you take any action?

A. Yes. It's similar to the sound amplification fee in that when a group requests that a fee be waived I go to an operations meeting and I put it on the table and if necessary we'll waive the fee.

MR. KINIGSTEIN: Your Honor—

THE COURT: No, no. This is Mr. Fosbinder's witness.

MS. LIBERATORE: May I continue?

THE COURT: Hold on. I will see if there is an objection. Any objection?

MR. FOSBINDER: No.

THE COURT: All right. Counsel may continue.

Q. Let me go back to the 3000 cap on the attendance at the bandshell. Does the location of the bandshell bandshell within the park itself affect the number of participants the Parks Department believes should be (549) permitted to attend events there?

A. Yes. One of the things that you have in parks, and specifically in Central Park, is pedestrian traffic, and it's not all that unlike traffic we have here on the streets of New York. The way the park is designed is people enter up through the mall, the mall serves as a tunnel to the concert ground, and what you have is people coming up the mall, and perhaps they want to get to Bethesda Terrace, they want to get to Sheep Meadow, or they want to get to another area in the park. If you go in excess of 3000 what you have is pedestrian gridlock, in essence. They come upon a block and there is no way to move, it's very difficult to get around the traffic, and it becomes problematic. There is a pedestrian flow just like you have a traffic flow with vehicles.

Q. Let me direct your attention to the weeks preceding the 1986 Rock Against Racism event.

THE COURT: Before you come to that, how do you interpret the attendance provision in your regulations, Mr. Killian? I draw your attention particularly to the second paragraph of that regulation, which says this:

> "If the sponsor or the bandshell program director anticipates more than 3000, an alternative site must be considered."

Now, if it stopped there it sounds as if perhaps (550) some consideration should be given, but not mandatory. But then the next sentence goes on to say:

> "For a program to be effective, manageable and with proper security, the crowd size must be limited to the above figure."

Now, my question is what does that regulation mean. Does it prohibit in respect of the bandshell area a crowd in excess of 3000 people?

THE WITNESS: We attempt to do that. However, there have been crowds larger than that size. You know, when you look at the entire concert ground area, you can fit more people. If alternatives have been considered and they have been rejected, either on the part of the Parks Department or on the part of the sponsor, then we consider if we can offer the bandshell safely, and we have done that in fact.

However, I should add that what we're trying to do with all sponsors is negotiate what their anticipated crowd attendance is. If I may give an example. The International Ladies Garment Workers Union hosted a Labor Day Event. They wanted a Labor Day picnic. They also wanted to have Pete Seeger sing at the picnic. We requested that their publicity primarily remain in-house, that is, for their members, so that it would not be an excessive

draw. Were they to publicly say "We're having a (551) Labor Day event with Pete Seeger and a number of other groups performing," we felt that would draw a large, very large, crowd, certainly in excess of 3000, perhaps in excess of 5000 to 10,000. In their case they were very happy because they wanted it strictly for their members, and so they were very happy containing the publicity within their union.

That's what we try and negotiate, so that we can pretty much stick to that figure where possible. There certainly have been exceptions.

THE COURT: So that if you received an application which estimated the number of spectators at 4000 would you solely on the basis of that estimated figure reject the application for the bandshell or would you follow some other approach?

THE WITNESS: I would first attempt to ascertain from the sponsors if that was a true figure. Oftentimes sponsors will make up a number. They really don't know. If it is an accurate figure based on what publicity they are going to do and the kind of groups they are going to attract, the kind of names, you know, that they have, then we will discuss it.

If—4000 I think you have to be lenient on. When you get over 5000, I think—I can't offer another site. What I offer is the other offices within the agency (552) and I suggest that they contact those places. To be honest, oftentimes they will contact those people and then will end up back at the bandshell for whatever reasons.

So at 4000 I think I would discuss it with them and we work it out.

THE COURT: Thank you.

BY MS. LIBERATORE:

Q. In your experience at the bandshell, does the Department of Parks ever just outright deny an application based solely on what the application says with respect to number of participants?

A. In my experience, that hasn't happened.

Q. What is done in that situation?

THE COURT: I think the witness has just told me that. Have you not?

THE WITNESS: Yes, I believe I have.

THE COURT: Asked and answered.

Q. Has the provision with respect to number of anticipated participants ever been applied or had the effect of denying a specific private sponsor access to the bandshell?

MR. FOSBINDER: Object to the form. It's what he actually knows about.

THE COURT: Confine your answer to your personal knowledge.

(553) A. To my knowledge, there is only one event that we denied use of the bandshell. However, we offered other facilities, and the other facilities were rejected on behalf of the sponsor.

Q. Let me direct your attention to the weeks preceding the 1986 Rock Against Racism event.

A. Yes.

Q. Did you contact any representatives from Rock Against Racism about their event?

A. For 1986? Yes, I did.

Q. Who did you contact?

A. I had received a letter—actually, it had been sent to Sheldon Horowitz, who previously handled bandshell permits—from

Christy Robb, and of course I had seen the application from James Fosbinder for the 1986 event.

After I received the letter I first called James Fosbinder and left a message on his answering machine. I also directly spoke with Christy Robb and just told her what the current status of the bandshell was and what the department was trying to do with the bandshell.

Q. Do you remember approximately at what time, what month it was you contacted Christy Robb?

A. I believe it was either late February or early March of 1986.

Q. What was your purpose in contacting this Rock (554) Against Racism representative?

A. Well, I contacted their representative not solely, I contacted a number of other representatives. I had a pile of applications and people were concerned about what was happening with their application. I wanted to inform representatives of Rock Against Racism that the department had reorganized and, in effect, were shifting the bandshell responsibilities for permits from Sheldon Horowitz to myself, and in addition to that I was drafting guidelines for use of the bandshell and I was full-time manager for the facility.

Q. Did there come a time when you sent all applicants for events at the bandshell in 1986 copies of the use guidelines after they were promulgated?

A. Yes.

Q. Did you know approximately when that was done?

A. It was late March of 1986.

Q. Did you also send a copy of the use guidelines to representatives for Rock Against Racism?

A. Yes, I did.

Q. After the representative for Rock Against Racism received the guidelines were you contacted at all with respect to the guidelines by that group?

A. Christy Robb and I spoke and we had—it was a brief conversation. I offered to set up any meetings that (555) they might want to discuss not only the guidelines but the event that they were proposing, as I was doing with many, many other groups at that time. She refused any kind of meeting and essentially said at that point we would have to speak to Rock Against Racism's attorney.

Q. And did you in fact speak with Rock Against Racism's attorney?

A. I spoke with Jim Fosbinder. It was either late—probably late March of 1986.

Q. Did you discuss with him Rock Against Racism's event, proposed event for 1986?

A. Briefly.

Q. Do you remember what the substance of his reaction to the use guidelines was, if anything?

A. Mr. Fosbinder I think was very concerned about the guidelines. Specifically, he asked if I had ever shown the guidelines to a lawyer, he asked if I had ever read the Constitution. He asked a number of questions like that. I offered to set up a meeting with representatives of the different departments of the agency. He refused and said he would take us to court.

Q. Did the Department of Parks in fact have a meeting with Rock Against Racism before they moved in court for an injunction?

A. We had no meetings whatsoever.

(556) Q. Are you familiar with this court's 1986 decision relating to the use guidelines?

A. Yes, I am.

Q. Do you know whether the court upheld the insurance requirement in the use guidelines?

THE COURT: Oh, I don't need the witness' assistance on that. I wrote it myself.

Q. Did Rock Against Racism provide any insurance for their 1986 event?

A. No, they did not.

Q. Did the Department of Parks permit Rock Against Racism to hold their event even though they did not provide insurance?

A. Yes, we did.

Q. Let me direct your attention to the weeks preceding this trial in 1987.

THE COURT: Ms. Liberatore, permit me. I asked you yesterday evening how much more direct you thought you had with this witness and your estimate then was 20 minutes and I took certain actions in reliance on that. What do you now say?

MS. LIBERATORE: I am sorry, your Honor. I am not very good at estimating this type of thing at this point.

THE COURT: I impose no permit or regulation on (557) you, but I would like to know how much more time do you think you have with this witness.

MS. LIBERATORE: I would estimate at this point 25 minutes.

THE COURT: All right. We will take a recess at this point.

(Recess)

THE COURT: Counsel may continue.

BY MS. LIBERATORE:

Q. Let me direct your attention to the weeks preceding this trial. Did Rock Against Racism submit a special events application for use of Central Park?

A. Are we speaking 1986 or '87?

Q. 1987.

A. Rock Against Racism had not submitted an application until very recently.

Q. Do you know approximately when the special events application was received by you?

A. I believe it was within the last two to three weeks.

Q. Do you know what date they are requesting for the 1987 event, Rock Against Racism?

A. They are requesting Sunday, May 3 for use of the Central Park bandshell. However, if I might add, they have also submitted applications for the use of the Great Lawn (558) in Central Park for May 2 and also use of the Great Lawn on May 3, apparently at the same time as the proposed event at the bandshell.

Q. Before you received Rock Against Racism's application for this year had you received other applications for use of the bandshell for the weekends in May?

A. Yes, I had.

Q. Had you received enough applications prior to receipt of Rock Against Racism's application to take all available weekends in May?

A. Yes, I had.

Q. Could you have denied Rock Against Racism's application at that point, on the lack of available space?

A. Based on the lack of date, certainly.

Q. Did you do so?

A. No, I didn't.

Q. Why not?

A. Primarily because it—I am familiar with all events at the bandshell and there are two reasons. One, I had seen that they had actually listed the date of May 3 in a publication, which struck me as unusual, that they would be listing a date for a performance at the bandshell when they hadn't put in an application, but I made a note of that, and then also simply because Rock Against Racism (559) usually puts in an application well in advance. When I say well in advance, usually it's about twelve months in advance of their event. So it's very unusual that they hadn't submitted an application.

Q. Did you take any action regarding the date Rock Against Racism traditionally applies for in May before you actually received their application in 1987?

A. In my own calendar I gave them the benefit of the doubt and just kind of earmarked it, assuming that at some point they would put in an application and that they would be requesting a date. So I tried to reschedule everyone else around that possibility.

Q. Were you successful in rescheduling?

A. Yes.

Q. At this time have you reached the point in the application process with respect to Rock Against Racism's 1987 event to discuss details concerning that event with them?

A. I believe we're at that point now. They submitted that application and we have sent them—I sent them a letter essen-

tially stating that we would honor that date subject to their following our use guidelines, and I also under separate letter sent them a tech requirement form and also a supplementary permit application form.

Q. Have you received any of those, that tech form (560) or supplemental application form, back from Rock Against Racism as of this day?

A. As of today, I haven't.

Q. Would you need that information in order to discuss in more depth the planning for their event?

A. Yes. We need to know all kinds of things, about their cleanup, who is cleaning up, and also what tech requirements they have.

MS. LIBERATORE: I would like to have marked as Defendants' Exhibit I two letters, I 1 and I 2. I only have extra copies of one of the letters.

Q. Do you recognize those correspondence?

A. Yes, I do.

Q. Could you describe what the first letter says? First describe who it's addressed to.

A. The first letter is addressed to Mr. Bruno Walter, who had put in the permit this year for Rock Against Racism.

THE COURT: Is it Mr. Bruno Walter or Mr. Walter Bruno?

THE WITNESS: Excuse me.

MR. FOSBINDER: Bruno is the first name.

THE COURT: I was looking at the letter dated March 20, which says Mr. Walter Bruno.

THE WITNESS: Yes, I see the inconsistency there. (561) I am not sure of the individual.

THE COURT: Which exhibit are you looking at? Is it I 1 or I 2?

THE WITNESS: I'm looking at I believe it's 2.

MS. LIBERATORE: Your Honor, I believe that's I 1, and that's the one I don't have extra copies of.

THE COURT: All right. What is Exhibit I 1, Mr. Killian?

THE WITNESS: This is a letter under my signature to Mr. Walter stating that we have received his permit application for May 3, 1987 and that we have set the date aside, providing he meets the terms of the provisions and the use guidelines.

THE COURT: The exhibit should be in evidence before I consider its substance. Is the exhibit offered?

MS. LIBERATORE: Yes, your Honor.

THE COURT: Objection?

MR. FOSBINDER: No.

THE COURT: Received.

(Defendants' Exhibit I 1 for identification was received in evidence)

MS. LIBERATORE: I also offer the second letter, which is Defendants' Exhibit I 2.

THE COURT: Did you write that letter, sir?

THE WITNESS: The I 1, yes, I wrote it. However, (562) it was actually drafted—drafted by me, but I went through Sid Nowell, who is parks counsel, because I wanted to run it by Mr. Nowell—I knew we were going on trial. I wanted to make sure that he understood that we were honoring the date, and someone

from his office actually did the signature, because my office is on 104th Street and his is on 64th Street.

THE COURT: Insofar as you are aware, the letter was mailed out?

THE WITNESS: Yes, sir.

THE COURT: Is there objection to the offer?

MR. FOSBINDER: No, not at all.

THE COURT: Received.

(Defendants' Exhibit I 2 for identification was received in evidence)

BY MS. LIBERATORE:

Q. Could you describe the second letter?

A. The second letter is also to Mr. Walter, saying that we're going to send him a special event permit, a supplementary application, and also a technical requirement form. And I sent those out personally myself, so I know that.

MS. LIBERATORE: May I have a moment, your Honor?

THE COURT: Yes.

(Pause)

(563) Q. Mr. Killian, do you have an opinion with respect to the Rock Against Racism event that you attended in 1986?

THE COURT: An opinion in what respect?

Esthetic, acoustic, political, social, economic? What on earth does that mean?

MS. LIBERATORE: I will withdraw the question, your Honor.

THE COURT: Please do.

Q. Were you offended at all by the Rock Against Racism event?

A. No, not other than the volume level.

Q. Has Commissioner Stern ever indicated to you that the permit application for Rock Against Racism should be denied?

A. For '86 or '87, both?

Q. For either year.

A. I have never had communication from Commissioner Stern regarding either permit.

Q. Has Commissioner Stern ever become involved in the Rock Against Racism permit application process, to your knowledge?

A. To my experience, Commissioner Stern has never been involved in the Rock Against Racism permit.

MS. LIBERATORE: If I may have a moment, your Honor.

(564) THE COURT: Yes.

(Pause)

Q. Did Commissioner Stern provide you with any substantive changes with respect to the use guidelines at issue here?

A. Commissioner Stern's changes were primarily wording, some phrasing and grammatical changes.

Q. So nothing that goes to the substance of the regulations?

A. No.

Q. I want to go back to an earlier point. I want to clarify something. When you did a calculation concerning the amount of money the Department of Parks took in from private sponsors—

A. Yes.

Q. —based on their sound system fees—

A. Yes.

Q. —did you compare the amount of money the Department of Parks took in from those sponsors to the amount of money the Department of Parks paid New York Sound for those sponsored events?

A. Yes, I did. There was a loss on the part of the Department of Parks of a few hundred dollars.

Q. In those calculations were you considering any other events other than those provided by private sponsors (565) at the bandshell?

MR. FOSBINDER: Asked and answered.

THE COURT: Sustained. We have been through this.

MS. LIBERATORE: I was just trying to clarify the point.

THE COURT: I understand it clearly.

MS. LIBERATORE: Okay.

Q. Mr. Killian, to your knowledge, based on your experience in 1986, were the use guidelines ever enforced by the Department of Parks so as to exclude any private sponsors who wanted to use the bandshell area?

THE COURT: Hold on just a minute.

(Pause)

THE COURT: Go ahead.

MS. LIBERATORE: I would like to rephrase the question. I withdraw the former question.

Q. Mr.Killian, to your knowledge, and based on your experience with the 1986 season, were any of the provisions contained in the use guidelines ever applied by the Department of Parks in or-

der to exclude any private group that wanted to use the bandshell area?

MR. FOSBINDER: Asked and answered.

THE COURT: No, I will take it.

A. They were not used to exclude any group, to my (566) knowledge. Some groups chose other sites within the five boroughs. One particular promoter wanted a large festival in conjunction with an event he was doing at Madison Square Garden. He withdrew his application. A number of applications were simply withdrawn. For instance, a number of people file applications and for whatever reasons, they can't get the acts together or whatever, they cancel. But in strict use of the guidelines, with the exception of the one event I have spoken of, no one was denied use of the bandshell.

THE COURT: And what was the one event you spoke of?

THE WITNESS: There is a salsa promoter, Ralph Mercado, and he was doing an event at Madison Square Garden. He wanted it in conjunction with that event with a beer promoter. He asked me—he would have about 50,000 people. And we simply met with Mr. Mercado and we expressed to him our guidelines and our concern. He simply said "Well, that's what I thought you would say," and he withdrew his application. He wasn't interested in other sites. He just wanted a free festival to go with his Garden dates.

MS. LIBERATORE: No further questions, your Honor.

THE COURT: All right. Counsel for plaintiffs may inquire.

(567) MR. FOSBINDER: Thank you.

REDIRECT EXAMINATION

BY MR. FOSBINDER:

Q. Do you still have the two letters in front of you?

A. Yes, I do.

Q. Could you read the last paragraph of the longer of the two letters and identify what exhibit number that is?

A. I believe it's Exhibit 1 or I 1. The paragraph reads:

"Additionally, I have today under separate cover letter forwarded to you the department's technical information form and supplemental special event permit application."

Q. Maybe the second to last. I didn't have a copy.

A. This one or this one?

Q. Excuse me. Could you read the last sentence of the first paragraph?

A. It states "Please be advised that the date has been set aside for RAR and the bandshell will be made available to you provided that Rock Against Racism meets the terms and conditions set forth in the use guidelines for the Naumburg Bandshell."

Q. Is one of the use guidelines for the Naumburg Bandshell a requirement that all of the City of New York's (568) parks and recreation rules, which have been introduced as Defendants' Exhibit G, be followed?

A. In general practice, rules and regulations of the department may supersede in some cases the guidelines for the bandshell. The guidelines for the bandshell are an attempt to be site-specific for specific needs and issues there.

Q. I am going to give you a document and could you identify the document and then read section number 9, please.

THE COURT: Is it in evidence?

MR. FOSBINDER: It is, yes. Exhibit F?

THE WITNESS: It looks like G on here.

MS. LIBERATORE: G.

MR. FOSBINDER: That's Exhibit G.

A. You have circled section 9 regarding posting of notices, advertising and display, and this isn't numbered.

Q. Could you read it?

A. There are two sections, A and B. A states "No person shall post, paint, distribute, display, affix, construct or carry and placard, handbill, circular, flag, banner, sign, model or other item, nor display such items by means of aircraft, kite, balloon or other aerial device in, on or above the surface of any park for any purpose whatsoever, except as permitted by commissioner."

(569) Section B reads "No person shall play a musical instrument or drum or cause any noise for advertising or commercial purposes or for drawing attention to any display, exhibition or performance."

Q. Has that rule been withdrawn, to the best of your knowledge?

A. To my knowledge, I am not totally familiar with the rules and regs. However, that rule was withdrawn from the guidelines for the Naumburg Bandshell.

Q. That rule is in the process of being withdrawn, is that correct, from the Naumburg Bandshell regulations?

A. I have blanked out by marker on all Naumburg Bandshell that requirement.

Q. We're aware of that. The question is has it gone through the process necessary to officially withdraw it as a regulation as of this date.

A. I believe it's in process.

Q. Do you know that it's in process?

A. That's what I have been advised.

Q. Who advised you that?

A. Parks counsel.

Q. Did parks counsel advise you whether rule number 9 in the Parks Department regulations had been withdrawn?

A. I don't know if rule number 9 has been—or section 9, rather, has been withdrawn from the parks rules (570) and regulations. However,—

Q. That's all. Thank you. Could you explain to me a little bit more about who was involved in the creation of the Naumburg Bandshell regulations?

A. As I stated in my affidavit, I interviewed a number of people within the Department of Parks and also held a number of meetings, Kate Pearson being one person—she is director of special events—Michelle Shebanie—

Q. Kate Pearson, what is her—

A. The current director—actually, I believe she has the title chief of special events now.

Q. And she has been—

A. She has been in the department I believe since March of 1986.

Q. But she was involved in drafting these regualtions?

A. I did the original draft and circulated it throughout the department for criticism and suggestions.

Q. Was she involved in that process?

A. A copy was circulated to her.

Q. Did she make comments?

A. Kate Pearson's comment, she felt the cover page was a bit too wordy.

Q. She made comments about the regulations?

A. That was the only comment she made.

(571) Q. Okay. Thank you. Can you give me the names of other individuals who had a more significant role in addition to yourself in drafting these regulations?

A. Marie Ruby, who is my direct supervisor. She is the chief of visitor services for Central Park. Also Ron Cianciulli, who I believe has testified he is the chief of maintenance and operations for Central Park. Michelle Shebanie had some ideas, as did Sheldon Horowitz had some ideas.

I had a large meeting with Robert Russo, who is the deputy commissioner of the Parks Department. In attendance, Kate was there, also Sid Nowell, Marie Ruby and myself. Sid Nowell is parks counsel. He and I had a number of meetings and extensive contacts in drafting and redrafting.

I also had a meeting with the Manhattan borough commissioner, Patrick Pomposello, which Ron Cianciulli was there, I was there, Marie Ruby was there, I believe Sheldon Horowitz was also there, and we discussed the guidelines.

Q. I take it you have answered my question of some year ago, that you did consult with a lawyer in drafting these regulations, and what lawyer would that be?

A. I consulted with Sidney Nowell, who is parks counsel.

Q. And I will ask my other question. Have you read (572) the Constitution?

A. I have read the Constitution.

MR. PINES: Your Honor—

THE COURT: I will permit it. Your answer, sir, is?

A. I have read the Constitution.

THE COURT: Very good.

Q. At any point in these discussions while formulating the guidelines did the question of the constitutionality of any of these provisions come up?

A. The question of constitutionality was not discussed other than that parks counsel made suggestions and changes in wording and phrases.

Q. Were you informed at any point that the use of the bandshell was in litigation?

When did you first hear about the RAR lawsuit? I will put it that way.

A. Well, I had a whole file on Rock Against Racism. So I knew that Rock Against Racism had held the events at the bandshell. I did not understand it was, as you're suggesting, in litigation. I know that the department had settled on previous occasions with Rock Against Racism.

Q. No one informed you when you took your position with the city that rules and regulations regarding the Naumburg Bandshell were at that point in litigation?

(573) A. I created the rules and regulations for the Naumburg Bandshell. How could they inform me that they were in litigation? I wrote them after I took the position.

Q. As I understand, you created the Naumburg—

A. The use guidelines for the Naumburg Bandshell in Central Park.

Q. But other rules and regulations that previously regulated behavior or activity at the bandshell existed, right?

A. Well, there were the parks rules and regs, yes.

Q. And your testimony is that no one in the Parks Department informed you that any of those rules or regulations had been challenged or were currently being challenged at the time you were hired?

MS. LIBERATORE: Your Honor, I would object as being irrelevant.

THE COURT: It may have to do with the manner in which these regulations came to be crafted. Of course, I must say, it seems to me that what the regulations say is the single most important issue on the constitutionality of what they say. But I will permit the witness to answer.

A. I had known that the department had been previously in court with Rock Against Racism. However, I didn't know of litigation that was going on when I was hired.

(574) Q. When did you find out?

A. Excuse me?

Q. When did you find out that there was litigation regarding the use of the bandshell currently in process?

A. I'm afraid perhaps I don't understand the legal system, because as I understood it, the previous claims had been settled and events had gone on, and I was drafting guidelines based on broad and general use of the bandshell by many, many different groups. I looked at Rock Against Racism's file but I also looked at many, many other files from other groups who were using the facility in drafting the guidelines.

Q. At any point did you have a contact with Mr. Chad Vignola?

A. I had contact—

MS. LIBERATORE: Your Honor, I would object to this question. Any contact or conversations he had with Chad Vignola, who was the attorney for the Corporation Counsel's office on this case, would be privileged as attorney-client privilege.

MR. FOSBINDER: I wasn't asking the content of those conversations.

THE COURT: You wish to establish simply whether or not he spoke to him?

Did you speak to him?

(575) THE WITNESS: I spoke to Chad Vignola, but it was—

THE COURT: That's all you need say.

Q. You testified that in drafting these regulations one of your concerns was a perceived problem of the quality of sound amplification at the bandshell. Can you identify any individual who told you about this problem at this point?

A. I couldn't identify one individual, no.

Q. In your consultations with Mr. Floyd, who you retained regarding sound systems for the bandshell—

A. Yes, sir.

Q. —were there any measures suggested other than raising the speakers so that they could be pointed down more at the audience—

A. Well, again—

Q. —to prevent the spread of sound.

A. Again, in general, prior to contracting with Mr. Floyd, we had discussed the idea of setting a decibel level. However, that seemed to prove impossible both to set and to agree upon.

Q. Why did that seem to prove impossible?

A. Well, according to both consultation with Mr. Floyd and also representatives of the Department of Environmental Protection, it seems that on a given day (576) weather conditions, tree foliage, how the sound bounces, how many bodies you have in a crowd absorbing the sound, are going to make it difficult to set one standard, you know, one standard that says from now on the decibel level is 75.

Q. Why does that make it difficult?

A. It makes it difficult because you're going to have to perhaps adjust the agreed-upon decibel level, either lower it or raise it.

Q. Why are you going to have to adjust it?

A. It totally depends on how the sound is on that particular day at that particular event. The way sound bounces, the way it moves around, is different at each event, and to set a specific level seemed impossible based on discussions with Mr. Floyd and also with the Department of Environmental Protection.

Q. You have said this repeatedly and I am at a loss. What precisely would be the problem based on what you were told by the consultants you hired with setting a decibel level of say, just for instance, 100 at the back of the bandshell area?

A. There seemed to be, to the best of my recollection, problems with the way sound is absorbed and bounces.

Q. Absorbed by what?

(577) A. Bodies, so if you have a large crowd—

Q. What would that have to do with the back of the audience?

A. If you're setting a decibel level, and in any decibel level there is probably going to be a range on either side, it's not going to be a consistent number—

Q. I'm sorry. What do you mean by that?

MS. LIBERATORE: Your Honor, I would object to this line of testimony. Mr. Killian has not asserted that he is an expert on the way sound operates in an outside environment. I don't think he is competent to testify—

THE COURT: But a great deal of evidence has been elicited from him as to his consultations with the expert and what he did in response to what the expert told him. I will permit the inquiry.

Whenever the witness is asked a question which he feels he lacks the expertise to answer presumably he will say so. But I think what counsel is focusing on, Mr. Killian, is what you were advised by your own expert advisor, to the extent that you can understand it and recall it.

A. To that extent, both the Department of Environmental Protection and Gary Floyd advised against trying to set one decibel level.

Q. What did they say the bad result of setting one (578) decibel level would be?

MS. LIBERATORE: Your Honor, I would object to the form of the question, bad result.

THE COURT: Rephrase it.

Q. Why did they say that one decibel level would not meet your needs?

A. To the best of my recollection, they felt that there were a number of other factors that affect determining what a decibel level is and that they could not state clearly what a decibel level should be at the bandshell.

Q. Could you tell me what you told the experts the problem was?

A. Well, I believe that the Department of Environmental Protection had been at previous events and had done measurements, events at the bandshell.

Q. What was the problem that you told Mr. Floyd you had that he had to solve?

A. I told Mr. Floyd we had a couple of problems. One problem was sound that was bleeding into other areas of the park. Another problem was groups that would be using inadequate systems for the bandshell. I requested that he look into sound vendors that could provide us with a quality sound system.

Q. Let's go back to one of these points, inadequate (579) sound system. Could you give me an example of an inadequate sound system that was used at the Bandshell that caused problems that you actually know of?

A. That I have—

Q. That you have firsthand knowledge of?

A. No, sir.

Q. Could you give me the name of any individual who told you that there was a problem specifically with inadequate sound system at the bandshell?

MS. LIBERATORE: Your Honor, I would say that that has been asked and answered.

THE COURT: I will permit it. You may answer.

A. I cannot state an individual, no.

Q. When you discussed with your acoustics expert the problem of the spread of sound did you discuss the fact that content might affect people's perception of loudness?

A. I did not discuss content at all. My contracting with Mr. Floyd and also with contacts with the Department of Environ-

mental Protection, it was clear to me that we were going to have a variety of musical events, from rock to jazz to minimalist, and that the system that is created should reflect the diversity.

Q. At any point in your discussions with the acoustics consultants you retained did you request any measurement or were you aware of any measurements that you (580) used in formulating the plan for a sound system, measurement of decibel levels at either the Grand Opera or the symphony events?

A. We don't have any symphony events at the bandshell.

Q. In Central Park, were you aware of any decibel levels or any measurements that were taken?

A. At the bandshell?

Q. Let's say the bandshell.

A. In 1986 I requested that the Department of Environmental Protection measure sound levels at a series of concerts. One concert was Rock Against Racism, one was San Juan Fiesta, one was Puerto Rican Folklorica. I requested others, but due to their manpower they turned down those requests. I believe Mr. Floyd also took some measurements, though—that's my knowledge.

Q. Did you at any point get any sort of a sense of what the decibel level might be in the audience at the Grand Opera?

A. For the Grand Opera?

MS. LIBERATORE: Your Honor, I would object to the form.

THE COURT: Sustained.

Q. Have you been informed by any of the acoustics experts you retained what sort of decibel level might be (581) necessary for quality sound reproduction at the bandshell site?

A. The decibel number? No, sir.

Q. Okay. Would it be a fair characterization to say that one of the main reasons for instituting the city-selected sound system was so that the city could control the volume at the bandshell?

A. The Department of Parks, as I have stated previously, sought to contain sound levels to the general concert ground area.

Q. Could you answer that question with a yes or no?

THE COURT: Read the question back.

Listen to it, Mr. Killian. See if you can answer it yes or no. If you cannot, say so.

(Question read)

A. Yes, and I would qualify it as I have previously.

THE COURT: It sounds like you're saying yes with an explanation.

THE WITNESS: That's correct.

THE COURT: Give me the explanation.

THE WITNESS: The explanation is we wanted to contain it to that area, and I think that's important, because we are not implying control over content or quality.

Q. Isn't it true that to the best of your knowledge nothing can be done in terms of mixing the sound to affect (582) the spread of the sound?

A. I am not an expert. I would disagree with that though.

Q. Can you tell me who told you what to the contrary?

A. Well, I can primarily just speak from my experience, that certain instruments, specifically, bass and drums, especially an electric bass, tend to carry quite a bit stronger outside, for whatever reasons, and I don't know the reasons, the sound tends to

travel significantly further than other instruments. In a mix at a board you can contain that, you can control that, so there is still an adequate mix both on the stage and for the audience but that doesn't bleed to other areas of the park.

Q. Won't that have the effect of substantially changing the sound and the quality that the audience hears?

MS. LIBERATORE: Your Honor, I would object to the form.

THE COURT: If the witness has a view on it he may express it. And that will have to be the last question. I must now interrupt this to deal with a matter which I thought I would be dealing with earlier. This will be the last question on this case, which will then be adjourned until 2 o'clock.

In case you have forgotten the question, Mr. (583) Killian, I will ask the reporter to read it back, and see if you have any comment to make.

(Question read)

A. To my experience, that would not significantly alter the quality of sound the audience hears.

THE COURT: This case is continued till 2 o'clock. Clean up the area as quickly as you can.

(Luncheon recess)

(584) **AFTERNOON SESSION**

2:15 p.m.

JOSEPH KILLIAN resumed.

THE COURT: Do you recall the oath that you were sworn previously?

THE WITNESS: I do.

THE COURT: It is still in force. Which is to say you are still under oath. All right?

THE WITNESS: Okay.

THE COURT: Proceed.

REDIRECT EXAMINATION CONTINUED

BY MR. FOSBINDER:

Q. I would like to begin by asking you whether you contemplated any less drastic means for reducing the spread of sound. Specifically, did you consider asking Rock Against Racism to tilt their speakers downward, as New York Sound did?

A. New York Sound did not tilt their speakers downward. The suggestion that I offered in previous testimony was a suggestion by Gary Floyd to raise speakers up, tilt them down, so that it would bounce. That was one idea, and I believe that I testified that the cost was prohibitive for that to be done.

Q. Were any suggestions made to Rock Against Racism by you or anyone else that you are aware of on any method (585) reducing the spread of sound for the 1986 event?

A. Not to my knowledge.

Q. Now, if we could go back to the question of the guidelines for a moment and the rules, what power do you perceive that you have to punish people who violate the rules?

A. Are you speaking to me personally, the department—

Q. You personally.

A. There are limited powers, and only within consultation with other groups. For instance, as an example, should someone not clean up the area, with discussion and consultation with Ron Cianciulli, director of maintenance and operations, a portion of the cleanup bond could be withheld. That's certainly one power.

Upon consultation and direction within an operating meeting, I imagine we could deny groups permits for future seasons. But that is only—not myself solely, I couldn't make that decision alone.

Q. Who could make the decision to deny sponsors or major responsible parties any and all future bandshell permit applications?

A. Essentially, I make those in discussion with the operations meeting. When we have meetings we discuss things and we discuss shall this be denied or shall it be (586) approved.

Q. Are there any procedures that you would follow in making this determination?

A. The procedures are if an application is excessive we contact the sponsor and we attempt to negotiate on those grounds, that it's excessive.

THE COURT: Excessive in what way?

THE WITNESS: Perhaps it may be in the number of hours they wish to use the facility or something to that effect or perhaps if they can't supply the number of bathrooms required or something like that. We attempt to negotiate with them. If after negotiation it seems that there is an impasse, then we go to an operations meeting and discuss it.

Q. Okay. Let me give you this document, which is Defendants' Exhibit F. Could you read the paragraph that I have marked?

A. "Failure to follow these guidelines as proven by evaluation and documentation can result in forfeiture of bond and provide reason to deny the sponsor or major responsible parties any and all future bandshell permit applications."

Q. Can you tell me how you determine who is a major participant?

A. I think we would go by the names on the previous (587) permit. Those are the only guideline that we have, in addition to our supplementary form, the names that are listed on there.

Q. Can you tell me specifically how this evaluation procedure would work or does work?

A. On the evaluation, especially after large events—it depends on the size of the event. But say the Urban Park Service was involved in the event. Usually they will write up a report, usually I will write up a report, perhaps there are photographs, perhaps there are letters that we have received, perhaps there is a videotape made, and then we evaluate those. However, that's not the case—it's extremely rare, these kind of cases.

Q. Has the city's Park Department, to your knowledge, ever told anyone who put on an event in Central Park that they would in the future not be granted any permits because they had violated the rules?

A. I can only speak about the Central Park bandshell and my experience there last year. That has never happened. I cannot speak for the entire Parks Department.

Q. If it were to happen, would the people who we alleged to have been responsible for breaking the rules have any right to appear before the people who would make the determination that future permit would be denied?

(588) MS. LIBERATORE: Your Honor, I would object to this entire line of questioning. This is not one of the provisions that the plaintiffs have challenged either in the amended complaint or in their conclusions of law. I submit that therefore any of this testimony is irrelevant.

THE COURT: Yes. I will sustain the objection to the line of inquiry.

Q. Let's go to the question of complaints.

MR. FOSBINDER: Do we have extra copies of Plaintiff's Exhibit—whatever the letters are.

Q. What exhibit is that?

MS. LIBERATORE: Let me just get the one that's marked.

Q. You have identified these as complaints received about RAR event, is that correct?

A. That's correct.

Q. How many are there?

A. Four written complaints.

Q. Referring to the fourth complaint from Isaac Asimov, do you perceive that to be a complaint about RAR specifically or a complaint about loud music coming from the bandshell every Saturday and Sunday afternoon?

A. I can say that this was written on the date of Rock Against Racism's event in 1986. I can also say that there obviously is a concern about sound levels coming from (589) the bandshell on Saturday and Sunday afternoons.

Q. With regard to the complaint, the third in the series, from Janet Jeppson, would you read the first paragraph?

A. "I appreciate your efforts to curb the excessive noise made by private groups who play amplified music in the park. I'm terribly distressed that Judge Haight sees fit to allow people to make as much noise as they wish."

Q. Is that a fair characterization of your efforts, Mr. Killian?

MS. LIBERATORE: Your Honor, I would object to that.

THE COURT: Yes. Sustained. I don't think this can be binding on the witness in any way.

MR. FOSBINDER: I would essentially be asking the same question about the second one, which states, from Florence B.

Friedman, "I understand that you have been trying to limit the use of the bandshell in Central Park and have put the rock bands and similar events off limits."

Given the fact that two out of the four complaints have almost identical perceptions of what Mr. Killian has been trying to do, I would appreciate some leeway in—

THE COURT: My only point, Mr. Fosbinder, was that this witness is neither privy to nor bound by the (590) mental perceptions of these correspondents. But having said that much, I will let you inquire.

Q. Did you have personal contact in terms of telephone calls with either of these individuals prior to the letters? Had you talked to either of these people prior to the letters being written, to the best of your knowledge?

A. To the best of my knowledge, I have not.

Q. So you have no explanation as to why Mrs. Friedman would have the perception that you were trying to limit the use of the bandshell?

A. That's correct.

Q. Could you give me some idea of what your relationship with New York Sound Company is in terms of who makes the decision to turn the volume up or down?

A. My relationship with New York Sound is such that for privately sponsored events, when there are public groups using the facility, most of them choose to appoint a representative who will be at the board and suggesting the mix and music characteristics to New York Sound. The extent—I can make suggestions to New York Sound as to loudness or as to softness, but in general it's deferred to the sponsoring group.

Q. Let me attempt to make this clearer. If Rock Against Racism were to be using the New York Sound system (591) and Rock

Against Racism's appointed representative said "Turn it up" and you said "Turn it down," what is your understanding of what would happen?

A. You're speculating on something that hasn't happened, but if such was the case I think I would walk the representative around the—again, the perimeter, the dead road, Bethesda Terrace, other areas on the outside of the concert ground, and clearly I think we could come to a reasonable decision whether it was too loud at that point. However, on the concert ground itself, I think the representative from Rock Against Racism would have total influence upon whoever is at the mixing board.

Q. What if you still disagreed after taking your hike about whether or not it should be turned up or turned down?

MS. LIBERATORE: Your Honor, I would object to the question as speculative.

THE COURT: Well, no, I think it's useful to help me understand exactly how this witness feels the operations of the guidelines function. I appreciate the witness says it hasn't happened yet, but that doesn't mean it won't in future, and we're dealing in part with what might occur in future. I think it's a proper question.

Do you remember what it is now, Mr. Killian, after all that?

(592) THE WITNESS: Yes, I believe I do.

THE COURT: All right.

A. In that case—and again, I am just guessing on my experience there—it's a subjective call. We're out there together. In fact—

Q. Who decides?

A. In fact, I may defer to them, as I have in the past for other groups. For instance, as I have stated previously, for the New York Grand Opera, I felt it was too soft, especially in the back. I

don't feel people could hear it. However, again, I deferred to them. Perhaps in this situation with Rock Against Racism I would also defer to them.

It's a judgment call on that day when you're out there. There are a lot of factors involved, including how many people are listening to it, at what placement they are listening to it. I don't think I can say clearly that if we're standing at the dead road and a representative of RAR and myself have a disagreement that I am going to run immediately to the mixing board and request them to turn it down. I don't think, especially in a situation where an event is under way, where you have a large audience there, I don't think you can made a rash decision based on a subjective call out there. I think you have to be very sensitive to that.

When events have begun, when they are started, there is not a whole lot we can do as parks officials to control or contain it. If—there are just too many qualities that go on out there when you're in the field that you don't want to create a disturbance and often is the case where you simply defer and you say, well, okay, we'll have to let this one go.

Q. If we could turn to the question of the $100 per hour fee for use of the sound system-

THE COURT: Before we come to that, one more question on that last subject. Correct me if I am wrong, Mr. Killian. In the event of just a plain disagreement with the sponsor, you are out on the perimeter, the dead road, and after listening with proper deference to the sponsor's representative you simply feel it's too loud, it's a lot too loud, and you fail in your effort to persuade the representative that that is so, under these guidelines, have you the authority, if you wish to exercise it, to require and direct that the sound be turned down by the New York Sound technician?

THE WITNESS: Ultimately, we—we, myself and parks representatives—have that authority. However, it can only be used I

think in extreme circumstances, when you, again, sense what the crowd is.

For instance, if you are receiving a tremendous (594) tumult of complaints, of people who want it turned down, I think then yes, you go ahead with that. However, if there is a crowd assembled, they are enjoying this music, if your turning it down would upset that crowd, would disturb that crowd, I think you have to be very, very careful with your judgment at that point.

Ultimately, I can make that decision. However, when the event is in progress its a very careful decision and it is not one that you simply jump into. There are too many factors that can backfire on you with a public crowd.

Q. With regard to the fee charged for use of the sound system, you testified that the charges were based on a daily basis from New York Sound, is that correct?

A. We were given an overall bid for a season of 50 shows, which broke down on a daily basis to a figure of $400 as cost to the Parks Department.

Q. Can you tell me based on your survey of sound system companies whether or not someone wishing to put on a one-hour event at the bandshell independently of the New York Sound system, independently of the system provided, would be able to find a system of that quality for $200?

A. I would have to know the nature of the event. I think for what New York Sound—

Q. I am asking about the nature of the sound system. The same quality sound system, somebody wants to put on a (595) one-hour event. Based on your survey, could you find a company with equipment of that quality who would be willing to truck it all to Central Park, set it up, operate it for one hour, break it down and truck it away, for what I recall to be a one-hour performance time plus the set up time allowance, which I think would be—

A. Yes, that's correct. That would be $200.

Q. Based on your survey, would it be possible—

A. And that's what we would charge a park user.

Q. I understand that's what you would charge. I am asking you whether someone who wanted to do that, put on a one-hour event on their own, would be able to find such a sound system for that price.

A. In all of our bid procedures we were basing it on 50 shows. The price reduction and the range that we were given was based on 50 shows. My discussions further with these sound companies is that it would be substantially more, three and four times as much, were they to only do a one-time only event. Now, that is not to say—

Q. That's the—

THE COURT: Let him finish.

MR. FOSBINDER: Okay.

A. That is not to say that there is not some sound company in New York City who perhaps you could get it do it for that fee. My caution would be we wanted to employ a (596) firm that was familiar with that site, familiar with the electricity, familiar with the amplification needs.

Many sound companies are simply a technician and their van, and you may be able to find someone, but I don't think you can find someone who could come out with that professional experience, with that inventory of equipment, with a rain date policy and with a familiarity with that facility for that price.

Q. Alternatively, a group wishing to put on an event of say eight hours plus setup and breakdown time, based upon your survey would they have any difficulty in finding a sound company to do that independently at a cost of approximately $900?

MS. LIBERATORE: Your honor, I would object to the question. I don't think it's at all relevant what the market rate is. I think that's what he is trying to get at.

THE COURT: No, I think it's relevant. If the witness knows he can answer.

A. I think I can answer you best by example. San Juan Fiesta each year has put on a large Hispanic festival at the bandshell. When they heard about our guidelines and our sound requirements, needless to say, they were very concerned. However, we approached them. They were, to put it mildly, elated at the fee. The fee for them, for a festival, a day-long event, was substantially lower than (597) they had previously been paying to outside vendors.

Puerto Rican Folklorica, which is in August of each year, had a similar experience. They were concerned about using the system. They came to San Juan Fiesta, they saw the system, and it was much cheaper, by their accounts to me, than they would have gotten for a festival day-long event.

The case was also true for the New York Grand Opera. It was a substantial reduction in fee for them also.

Q. Would it then be fair to say that, to the best of your knowledge, every group that uses amplified sound at the bandshell stands to come out ahead financially except Rock Against Racism?

MS. LIBERATORE: Your Honor, I would object.

THE COURT: Overruled. If the witness has a basis for answering, he may.

A. I don't really know if they would come out financially ahead. I am not guaranteeing this as a method. They may. They certainly may not. Many groups benefited from our bulk rate, if you will, cost. By booking 50 shows we received a much better rate than they will on a one-time only event. However, I cannot say I

guarantee you a price reduction here and you're going to save so much by doing your event with our sound system. That may not be the case.

Q. Would it be fair to say that RAR, which you know (598) owns its own equipment or provides its own equipment, is the only group that you know of that stands to spend more money on sound at the bandshell?

MS. LIBERATORE: Your Honor, I would object to the form of the question. It's not been established that Mr. Killian knows anything about who owns the sound system used by RAR.

THE COURT: I am sure the witness understands that he may answer only on the basis of his own knowledge. If he does not know he need only say so.

THE WITNESS: May I have the question repeated?

THE COURT: Read it back.

MR. FOSBINDER: I can rephrase it to eliminate that objection.

THE COURT: You may ask the witness to assume certain things.

Q. Assuming that RAR owns its own system, is RAR the only group that you know of that used the bandshell last year that would have stood to pay more money because of the new regulation for sound?

A. I would point to the example of Theatre For A New City. They own their own sound system and again I believe the fee was waived because they did it on a date when we had another event. If a group simply comes down to a situation where financially it is going to be difficult, (599) if not impossible, then I think we have to negotiate that, and I think we negotiate a reduced fee or we negotiate a waiver of the fee, whatever the particulars may be.

Q. What standard of proof do you use to determine whether or not a group can afford a fee?

A. The only standard of proof we have is the group's representatives and their honesty. Certainly many groups could come before us and say "We don't have the money." I think we would have to negotiate, and if that were the case, then we would have to waive the fee.

But we don't have a rigorous system of checking bank accounts or anything like that. As in the application, we can only go by the suggestions of the representatives of the group, what their idea of the event is and certainly of what their idea of their financial situation is.

Q. Let me give you another hypothetical to try to understand better the limitations. If someone comes to you and says "I want to put on an event for 3000 people at the bandshell and I've got a ton of money, I want the very, very, very best sound system available and I want the very, very, very best operator for that sound system," would there be any opportunity for them to provide their own operator or additional equipment?

A. They would—again, we would sit down in negotiation and discuss that. I can give you an example. (600) When you suggest additional equipment, for the New York Grand Opera, they particularly like a microphone called a PZM microphone, which is a plexiglas microphone which sits on the stage and is developed for theatrical use. It's a microphone that costs near $2000 each. Very, very few sound companies own it. They usually rent it out from a larger firm. They requested four of those. Our sound firm does not own those, New York Sound does not own PZM's.

We sat down with Vincent LaSelva, who is the director of the Grand Opera, and he requested this type of microphone because it is sensitive to the voice, sensitive to theatrical work, rather than big boom overheads, and New York Sound costed out what additional cost that would be. We discussed it with Vincent LaSelva. Mr. LaSelva was very willing to pay the extra fee for the rental of

this equipment because it was a specific item and in fact we did add that to the inventory for the opera's evenings.

That's a case where—you know, there are some instruments where you may want a very special or, as you say, the best microphone. Some microphones are geared toward horns, some are toward voice, some are toward percussive instruments. I think if a sponsor wants to bring in a piece of equipment like that, specific to their needs, if we can negotiate with the sound company and the sound company can patch it into their system, we're obliged (601) to do that.

Other than that, though, the sponsor is still required to use our sound vendor and our sound vendor's essential unit.

Q. I guess I am still unclear as to the answer to my basic question, which is if somebody said "These speakers are junk, these amplifiers are junk, I want something that costs five times as much, five times as good as far as I am concerned, the producer you got for the event is junk, I'm going to have a guy who does Frank Sinatra when he appears in Vegas, I am going to do everything, the best that can possibly be done," can you do that?

MS. LIBERATORE: Your Honor, I object to the form of the question.

THE COURT: No, I will take it.

MS. LIBERATORE: It's irrelevant.

THE COURT: No, I don't think so. I will take the answer.

A. I think at this point it's very speculative. This situation has not arisen. However, I would present the sponsor, as I always do, with an inventory of equipment. I have not heard a sponsor say "Well, this is junk, this amplifier is junk, these speakers are junk." In fact, the turbo sound speakers that we used last year are current (602) state of the art. However, if someone did say that, I think we stand by the fact that it is a requirement to use our system. However, the consideration is given that at this point we

have a very, very good track record with groups and with groups using it.

THE COURT: With respect, Mr. Killian, that's really going beyond the scope of counsel's question. I understand your testimony to be that with the exception of such patching in of additional special mikes as New York Sound might be able to do to satisfy someone like Maestro LaSelva, you would insist upon the basic sound system supplied by your vendors being used at the bandshell, true?

THE WITNESS: True.

THE COURT: All right. Now, how about the second half of Mr. Fosbinder's question, and that is the sound engineer. Suppose the sponsor says "Well, all right, I will leave all my stuff that I really prefer at home, but we do really feel very strongly about having our own sound engineer, who has been with this group since it was founded, being the man in charge at the soundboard. So we do ask that you let our sound man, after familiarizing himself with the machinery, be in charge of the soundboard." Would you let him do that?

THE WITNESS: Again, every company has a representative at that board, and in fact it works best, (603) not necessarily for the mix, but specifically if they are using tapes for cues. So like if a dancer comes out on stage, their sound man is the best person to push the button that the tape goes on because they know the exact moment, not our sound people to push that particular button, because they haven't seen the performance. However, the actual mix is still our vendor is at that board because that board is owned by that sound company and that person is most familiar with that board. But absolutely, a representative should be at the board to represent the best interests of that performing arts group.

THE COURT: I don't think that's quite what I asked. Suppose the sponsor said "We want only our people there at the

soundboard, in sole and exclusive control of the knobs and the dials. We don't want a New York Sound technician there at all. We will use that equipment, but the only engineers we want up there during the performance are our own sound technicians."

That's your question, isn't it, Mr. Fosbinder?

MR. FOSBINDER: Yes.

THE COURT: Would you permit that?

THE WITNESS: I hate to say it, your Honor, but—

THE COURT: Tell me the truth.

THE WITNESS: In that case the vendor—the question is would the vendor permit it. If they have (604) invested $50,000 in equipment they are very reluctant to let anyone else near their board.

We don't own the equipment. We're contracting with them. We're not renting equipment. We're renting it with technicians. Whether you can get a sound company to agree with that, that's a pretty tough bargain. You may, you may not.

THE COURT: Would you be inclined to ask them?

THE WITNESS: I would be inclined to ask them, certainly. But again, they own that equipment. It is their insurance on the equipment, it is their liability on that insurance.

THE COURT: All right. Thank you.

BY MR. FOSBINDER:

Q. With regard to the question of hooking up to electricity, are you familiar with all of the equipment RAR uses in terms of its fusing mechanisms?

A. I am not familiar with it.

Q. Are you trained in the field of electronics in any way?

A. I have extensive experience in electronics. However, I am not trained in that field.

Q. Was RAR asked to change the way they hooked up the electricity?

A. The event had started. I saw no reason to (605) disrupt the event to change connections. However, I monitored it backstage, and that was the extent of that.

Q. With regard to vehicles, RAR has testified that a significant difficulty arises in identifying precisely what vehicles will be used on the day of the event. Could you explain to me why you can't issue a certain number of permits without the vehicle ID number and license number?

A. I would first like to acknowledge—

MS. LIBERATORE: Your Honor, I think I would object. I also believe that this is not within the scope of the plaintiff's pleadings. I don't think they are challenging the vehicle permit question. I may be incorrect on that, but I don't believe that that is among their challenges.

THE COURT: Perhaps. But counsel for the city elicited a good deal of testimony about vehicles. So if the door was not opened before, it's open now. The witness may answer.

A. I would first like to acknowledge that most groups have similar problems. Most groups request blank vehicle permits. "Hey, just gave me six or ten and I'll take care of it."

In fact, we need that information on our books in case an occasion arises where there is a problem, where there is an injury, where there is an accident. A case in (606) point is in previous what I had been told, and I also found it true this year, I would give a permit to someone, they might whiteout their name, xerox it, and all of a sudden we had three or four vehicles that were not permitted there.

We're very concerned about vehicles in the park on weekends due to pedestrian traffic. So we require—

Q. How do you deal with the problem that you just identified in your permit system of people whiting out portions of the permit and duplicating it?

A. At that point, once someone has duplicated a permit, there is not a whole lot we can do. We also now put permits on stationary with the green maple leaf, so if they are xeroxed or copied you would get a darkened maple leaf rather than a green one.

The concern of ours, we don't have rangers or police officers at every single gate on weekends. So it's very difficult to police that. We're trying to collect the information in case there is an accident, so that we're responsible, so that if something happens we can identify what vehicle was out there, what the color was, who the owner was. That's the extent of it.

And in most cases, yes, people have problems, and in most cases we grant them the permits late, it could be a Friday, it could be late in the situation till they have all the information collected.

(607) In certain cases, I should point out, where there have been festivals and they can't collect all this information, groups prefer to have a shuttle vehicle between either Central Park West or Fifth Avenue that goes out, it picks up the bands, it brings them in, it takes them out again. So we have only given out one permit that simply shuttles the groups back and forth between the perimeter of the park and the bandshell. To me this is a very safe way of doing it, rather than continuing to bring in multiples of vehicles. Then you only have to identify one vehicle and one driver, one owner, et cetera.

Q. In terms of safety for the users of Central Park, would it be better to have equipment brought in at 6 o'clock in the morning on a Sunday in May or 10 o'clock in the morning on a Sunday in May?

A. That kind of decision would depend on factors of are there other events—I would have to consult Bill Dalton or a representative from his office as to where events are, can we cut through. Generally it's much better, since I have somebody, usually myself, managing the site, it's much better to have them come in prior to the event, two hours before, the 10 a.m. time. That way it's clean setup and it's just much easier.

Q. I don't think that was responsive to the question. I am puzzled. You're trying to reduce the (608) danger of setup vehicles interfering with pedestrian or bicycle traffic in Central Park. Based on your familiarity with the park, and having been there, as you stated, for practically every event, are there more people riding bicycles and running in Central Park and walking in Central Park at 10 a.m. on Sunday morning or at 6 a.m. on Sunday morning?

A. There are certainly more people. However, I think the thing you have to acknowledge is you need someone to manage that group from 6 a.m. on. Usually they want access to the facility, they want access to electricity, and for management purposes it's often better to have them there at 10 a.m.

Q. Can we talk a little bit about the rule regarding no amplified sound till noon on Sunday?

A. Yes.

Q. Have you had a number of applications from religious groups wishing to conduct events on Sunday morning?

A. 1986?

Q. Yes.

A. 1987?

MS. LIBERATORE: Your Honor, I would object on the ground of relevance.

THE COURT: The difficulty is that all of these (609) regulations the witness was taken by the hand through during questioning by the city, and so I am bound to permit some cross-examination, which I do. Counsel may inquire.

A. May I have the question repeated?

THE COURT: Read it back.

(Record read)

MS. LIBERATORE: Your Honor, I might also point out that I believe Mr. Fosbinder is incorrectly stating what the regulation provides. If he could perhaps recast in terms of what the regulation is or refer the witness to the regulation.

THE COURT: Let's get the regulation before the witness.

MR. FOSBINDER: Is this Exhibit F?

MS. LIBERATORE: Yes, it is.

Q. Would you read into the record what the regulations are with regard to Sunday morning?

A. I am afraid I don't find anything in here regarding Sunday mornings.

MS. LIBERATORE: There is nothing in there about Sunday morning. Take a look at the regulation.

MR. FOSBINDER: All right.

Q. There is nothing in those regulations about Sunday morning, is that correct?

A. To the best of my knowledge, that's correct.

(610) Q. Did I mishear something earlier? Didn't you say that sound amplification wasn't allowed before noon on Sunday?

A. May I read from the regulations?

Q. Sure.

A. "In deference to nearby residential neighbors and park users who enjoy quiet mornings, sound amplification is permitted

only after 12 p.m." It continues: "This may be waived in certain cases of children's theatre and acoustic music."

Q. So it's 12 o'clock every day?

A. Correct.

Q. Can you tell me what the standards are for determining whether or not that could be waived? Can you enumerate anything beyond what it says there or is that it?

MS. LIBERATORE: Your Honor. I would object again on the grounds of relevance.

THE COURT: Was this covered on defense counsel's questioning? I remember the vehicles were.

MR. FOSBINDER: Yes. The hours thing was brought up by the city, as I recall.

THE COURT: I think so. I will permit it.

MR. FOSBINDER: Otherwise I wouldn't have thought of it.

THE COURT: I will permit it.

(611) A. Again, I'm sorry, I need the question restated.

Q. I will restate it. Can you tell me what circumstances you can imagine where that requirement that sound amplification not be used until noon might be waived?

MS. LIBERATORE: Your Honor, I would object to the form of the question.

THE COURT: No. The witness may answer.

A. I'm speculating because I—certainly that can be waived. However, I am not certain of circumstances. For instance, if a group had to start at noon on the dot and they wanted to sound check prior to that, I am sure we would waive some time so they can do a sound check prior to noon. Now, that may be 11:45,

11:30, something like that, so that they can be ready to go at noon. I am not certain of other situations or circumstances.

THE COURT: What did you have in mind when you drafted, if you did draft, this sentence: "This may be waived in certain cases of children's theatre and acoustic music." What does that mean?

THE WITNESS: For instance, some groups arrive and they are setting up in the morning, perhaps from 10 o'clock to 12 o'clock, and they have their field of workers out there.

A case in point is San Juan Fiesta. They would like to provide music for their workers who are setting up (612) the barriers, the benches, so on and so forth, like that. Their concern is not to have their event start then but rather as their people are doing this work to have a bit of entertainment, and generally it's acoustic and unamplified, and I don't think we see anything wrong with that, as the group is setting up, if they want to put on a tape while people are preparing. It makes sense. However, their event isn't starting at that time. It's a setup time for them.

THE COURT: What does acoustic music mean in this context, unamplified music?

THE WITNESS: That's correct, yes.

THE COURT: That's what you meant when you wrote the phrase acoustic music?

THE WITNESS: That's correct.

THE COURT: Okay fine.

BY MR. FOSBINDER:

Q. Does this mean that you can amplify unamplified music before noon? That what it seems to mean.

THE COURT: Then it becomes amplified music.

A. That's correct. I must admit, I am confused. However, I feel that we need a bit of latitude. When a group has say 50 or 75 people setting something up and they want people to be able to sing songs together it's fine. If perhaps they would like to put on a tape that (613) accompanies these people I think it's fine if it is for these people, if it is not a public performance where they are trying to fill the entire area.

In the case of Rock Against Racism this was true. They did a number of sound checks prior to noon and it was without objection because it was clear that it was sound checks and it was clear that they were trying to get their sound level corrected so that they would be prepared to go at noon.

Q. I don't think that the question regarding acoustic versus nonacoustic has really been explained. Could it fairly be said that acoustic instruments are traditional instruments, such as non-electric guitars, oboes, flutes, violins, so on and so forth? Is that your understanding of what acoustic instruments are?

A. Without amplification. I mean, if you amplify an acoustic guitar with a pickup it may as well be an electric guitar, there is no difference.

Q. I am inclined to agree it's a difficult line to draw. I am trying to find out where you thought the line existed.

A. I feel the line exists—again, this is quite conjecture in a certain sense—if someone comes with the traditional instrument, as you suggest, as long as it's unamplified, they may play till their heart's content prior (614) to noon. If they put a pickup on that—you could put a pickup on an oboe, a guitar, a harp, any kind of instrument—then it's an amplified instrument at that point.

Q. Okay. Let's talk a little bit about the question of what size crowd the bandshell is capable of holding. I believe you referred to the bandshell grounds.

A. The concert ground?

Q. The concert ground. Can you point out on the map what area you regard as the concert ground?

A. Framing it on here, this refers to the concert ground. Now, you have your bandshell here. Generally you can refer to the entire area as the concert ground. This being west, so it would be east to the bandshell itself, the northern perimeter of the mall, and this is the southern perimeter, where the stairs go down Bethesda Terrace. This is the concert ground as we identify it.

Now, generally, for audience purposes and for our seating purposes, we regard the area—it's a smaller area within here. It's essentially a large box, probably measuring 100 by 200 feet, where we have seating area, where we have, you know, our barrels for litter and things like that.

Q. Can you tell me approximately what percentage of this entire area that you originally outlined this 100 by 200 foot smaller box is?

(615) A. Not knowing the scale on here, all I can do is go something like that. However—

Q. Okay. Can you now tell me why it would be impractical for people to gather in this, although imprecise, admittedly much larger area?

A. The impracticality comes from the fact that on a weekend this entire area here is filled with park users, roller-skating, trick bicycles. These are volleyball nets.

Q. I think I have limited myself to the edge of this.

A. One of the difficulties here—I am not saying it's totally impractical. Certainly people may be here. However, people walk up the mall, and as the mall was designed—

Q. Can you tell me—

THE COURT: You really have to stop interrupting, Mr. Fosbinder. The witness is doing pretty well responding to your questions, but you don't help by breaking in all the time.

A. The way the mall is architecturally designed, people come up the promenade to this area. As you see, if you reach this area and this is full with people there is an impasse here. Where do you go? How do you get to Bethesda Terrace? How do you get through here to Sheep Meadow or back up here to Rumsey Playground?

(616) So that's a concern of ours, is to keep this walkway open. So we try and keep the audience crowd on this side. That way there is no conflict between the audience and people who are going to other areas of the park.

Admittedly, it's a very difficult line, where you say, well, you can't step over this line. Certainly people—these islands are grass islands surrounded by benches. Certainly people sit back here and observe a concert at the bandshell mall. But that doesn't interfere with the traffic here. What we're concerned about is this traffic flow.

Some of the other problems you have is we park our vehicles down here. When I say "we"—excuse me—I mean the sponsor's vehicles down here. Getting vehicles up here to the concert ground and back down is difficult if you're full of people throughout here. So we try and have routes free that are open. Also for ambulances to enter should there be an emergency.

That's the best description I can give you.

Q. I have one more question. Can you tell me approximately the distance from the front of the bandshell to the back of these islands which you have identified as grassy?

A. It's a guess. It's a guess. I really couldn't (617) say until I walked it out. That may be 100 yards, it may be 150 yards. It's a guess though.

Q. One maybe final point, at least. Can you tell me what is the procedure for allocating the bandshell site if you have conflicting applications.

A. It is essentially a first come, first serve situation. However, what's examined is if a group has other permits in. For instance, sometimes a group will put in a permit for five or six dates. Now, in a case like that we honor their first date. However, after that, in fairness to other groups, we try and allow other groups to use the facility on the potentially successive days. So we try and give everyone their first choice of a date.

A case in point—as a matter of fact, one of the exhibits already brought forward—was with the Fourth Wall Repertory Theater. They had requested a number of dates and I gave them their first choice of dates. However, there were a number of other applications in and I simply turned them down. Mr. Bear came to me and he said "Listen, if you have an opening any other time in your season can you give me a call, can you let me know," and in fact we had an opening in September and they presented a second concert.

So that's how we deal with those situations.

Q. Let me try to restate the policy and then you (618) can tell me if this is the policy. It's first come, first serve for your first application for each year and for each subsequent application it's whether or not you feel you can fit them in?

A. No. We are trying to respect that there are many, many people who try and use this multiuse facility. We do not feel that a group should dominate that to the exclusion of other groups. We also feel that where necessary we will assist groups in getting the date they require.

For instance, in this case, as I have already testified, Rock Against Racism had not filed a permit for 1987. I had already received enough permits for May that would have made it impossible to accommodate Rock Against Racism at the Central Park bandshell. However, as a manager of a facility I feel a certain responsibility to find out what their interest is, because we're in litigation. Are they interested in hosting another performance, are

they interested in having another festival there? And so there are occasions where we will make the phone calls and we will see what the group's interest is.

Q. Is it fair to say that your testimony is that the frequency of use of the Central Park bandshell creates many of the problems that you have to deal with?

A. You mean the number of dates that the facility

(619) is used?

Q. Yes.

A. That's correct.

Q. Are you aware of any policies that the Parks Department has which would discourage the use of other areas in Central Park for First Amendment activities?

MS. LIBERATORE: Your Honor, I object. That's beyond the scope.

THE COURT: Sustained.

MR. FOSBINDER: That's it.

THE COURT: Further questions by the defendants of this witness?

MS. LIBERATORE: Yes, your Honor.

RECROSS-EXAMINATION

BY MS. LIBERATORE:

Q. Do you have Defendants' Exhibit G?

A. I don't have G.

Q. Let me refer you to section 9 of Defendants' Exhibit G. I am referring to subparagraph (a). Would you read the final phrase in that paragraph?

A. The final phrase is "Above the surface of any park for any purpose whatsoever, except as permitted by the commissioner."

Q. Are the use guidelines that have been marked as Defendants' Exhibit F promulgated by the commissioner of (620) the Department of Parks?

A. Yes, they are.

Q. With respect to the suggestion that Mr. Floyd made concerning tilting speakers—

A. Yes.

Q. —could you describe in more detail what that would have involved had the Department of Parks implemented the suggestion?

A. It would have—one of two things would have had to be done. We would have had to fix guy wires at the bandshell approximately 20 feet long with electric winches. You would then winch the speakers up each event, hang them overhead for the event, slant them down. It's an excellent method, except if you have to do that every week. Most facilities that do it are permanent facilities, where you put them up once and they stay there. You don't have to worry about winching them, you don't have to worry about personnel, you don't have to worry about the guy lines, things like that.

The other method would have been to build towers approximately 20 feet tall. You would still have to get the speakers to the top of the towers somehow and just sit them up there and slant them down. We felt there was a danger in both methods, specifically with towers, when we're not there, since it's not a facility that could be (621) locked up. People could certainly get on them, jump off them, things like that. So we felt that that system—the suggestion of that was prohibitive costwise.

There is also no guarantee that it was going to reduce the bleed to outside areas. Rather, it was a suggestion, but it didn't seem one that we could implement.

Q. Let me direct your attention to Isaac Asimov's letter, which is one of the Exhibit H exhibits. I believe it's Exhibit H 3. Is this letter dated?

A. This letter is dated May 4, 1986.

Q. Up until the date of May 4, 1986 had there been any amplified events held at the bandsheil in 1986?

A. There were no—the March of Dimes has an event where people sign up and as such they have used our sound system to tell people which lane to get in, you know, where to get their registration cards for the walkathon.

Q. But there was no amplified musical festival type of event before that?

A. That's correct. Rock Against Racism was the first concert of the 1986 season.

MS. LIBERATORE: If I may have a moment, your Honor.

THE COURT: Yes.

(Pause)

Q. Mr. Killian, if you were to direct the sound (622) technician from New York Sound during an amplified event to lower the sound volume would he comply with your direction?

A. This is during a publicly sponsored event?

Q. You and I have difficulty with private and public. A private sponsor is involved in this event, yes.

A. I believe so.

MS. LIBERATORE: One more moment, your Honor.

(Pause)

MR. PINES: Your Honor, if I might be heard just for a moment. One problem we have, just for the purposes of our record, is that we're trying to figure out the most efficient way of describing Mr. Killian's testimony about the bandshell area, and I would ask the court's permission, if possible, basically to lead Mr. Killian through his prior testimony, simply describing where he was referring on the map, because there is no testimony linking the map to the testimony. There is a lot of over here, over there. I would ask the court's forbearance on that.

THE COURT: Use a red pencil, whatever you like, and make it an audiovisual exhibit.

BY MS. LIBERATORE:

Q. Mr. Killian, let's start with where on this map are the cars parked for the sponsors. Mark it with Cars.

A. Of course, this is dependent on how many cars are requested in the area.

(623) MS. LIBERATORE: Let the record reflect that the witness has written the word Cars in the area indicated at Center Drive on this map, Defendants' Exhibit A.

Q. Would you outline in red the larger area you consider the concert grounds total on the map.

A. Total on this map, it would be an area like that.

Q. So the concert ground is the smaller of the two areas that you described previously?

A. That's correct. Generally—and I am only sketching this, without walking it out—it's approximately this area here.

MS. LIBERATORE: Let the record reflect that the witness has drawn a rectangular figure emanating out of the bandshell area, just above the word Concert Ground on the map.

Q. Could you indicate where the pedestrian walkway that you have described is on this map? Call it Walk, put the word Walk in red.

A. And that walk comes up or can go this way. Of course, it may go this way also.

MS. LIBERATORE: Let the record reflect that the witness has written the word Walk in an area that commences from the left hand of the map and continues through the area designated on the map as Concert Ground.

A. Just for notice, this is 65th Street here or—(624) it's not quite, because there is a drive here, but that would be equivalent to—actually, 67th Street—excuse me—67th Street.

Q. So the left side of the map is then 65th Street, approximately?

A. No, no. This is 67th Street.

Q. 67th Street, approximately. And where the Terrace Bridge begins—

A. The stairs to the terrace begin just south of 72nd, this being 72nd Street here. The stairs are—

Q. Okay. Would you write the word Stairs in the area you're indicating the stairs.

(Witness complied)

MS. LIBERATORE: Let the record reflect that the witness has written the word Stairs in an area that's just below the word Terrace Bridge and number 1 on the map, Defendants' Exhibit A.

Q. In what direction would the vehicles move in order to get from the area where they are parked to the area that is the concert ground or the bandshell?

A. They would have to move either this way and through here or they may also move this way and down. They may also take a third route and go down this way, though we try and limit this way, because it's very difficult. It's really not featured here, but there is like a curve here (625) that's very difficult to jump. So we try to send them down this way.

MS. LIBERATORE: Let the record indicate that the witness has drawn arrows indicating routes that vehicles would take in order to get from the parking area to the bandshell area.

Q. Would you write the word Route on each of the arrowed lines.

(Witness complied)

Q. And the grassy islands I believe you talked about, could you just put a capital I on the island.

(Witness complied)

MS. LIBERATORE: Let the record reflect that the witness is drawing capital letter I's on five separate islands that are above the word Music Pavilion on Defendants' Exhibit A.

A. Not seen on this map, if I may say, there are other islands. This is a rough one here, there is one here, and there is another one back here. These are smaller islands where there is simply a tree and, you know, three feet of grass or something. But there is a tree and there is whole curb line.

Q. In the event of a medical emergency at the bandshell what route would an ambulance take in order to—

A. It would depend on where the ambulance is coming (626) from. Perhaps it often would enter this way and onto the concert ground.

Q. Enter from what street onto—

A. 72nd Street.

Q. So it would enter from the 72nd Street gate?

A. That's correct.

Q. And go through and up—

A. And turn south to the concert ground. The thing that should be said, however, is ambulances, especially in the park, have a certain license, shall we say, to drive whichever way they want in order to get to the facility fastest. So sometimes they will be entering really against the flow of traffic in the case of ambulances.

Q. Do the ambulances use the roads as indicated or do they use the grass areas?

A. They don't use grass. However, they will use occasionally walking paths also. For instance, they can come through here and shoot into the bandshell, they can also come up through here and come into the bandshell. There are many routes of access. These are walking paths, but ambulances do drive on those.

Q. Would you just draw, entering from 72nd Street and Fifth Avenue, the route that an ambulance would take from there?

A. Might also enter there.

(627) Q. Would you just put the word Ambulance on the drawn red line.

(Witness complied)

MS. LIBERATORE: Let the record reflect that the witness has written the word Ambulance on the red line indicating the route that an ambulance would take.

Q. Mr. Killian, let me show you Joint Exhibit 1, beginning with page 67. Do you recognize what commences on page 67 in that exhibit?

A. Yes. This is a report to the Central Park Conservancy prepared by the Sociology Department, the Graduate Center, City University of New York.

Q. How are you familiar with that report?

A. This is one of the reports that I used to obtain and draft the guidelines for the use of the Naumburg Bandshell.

Q. Specifically, what does that report deal with as a general subject matter?

A. Specifically, it deals with a number of people in the park, types of activities they come to the park for, locations in the park where they congregate and use of those facilities, and also essentially—it's a user survey directly.

Q. Does that report describe the uses of the bandshell area?

(628) A. It describes and reports for usage in the south end of the Central Park, which is what the bandshell is in.

Q. Does it mention the bandshell in particular?

A. I haven't looked at this in a while. Excuse me.

Q. Okay.

A. I believe it basically speaks of use of the park, pedestrian traffic through the park, and in those respects it speaks of the bandshell, Bethesda Terrace and the mall area.

Q. What does the survey indicate with respect to the uses of the bandshell area?

A. Well, again, to that area of the park, almost 60 percent the primary activity is relaxation. The weekend—

Q. There is no question.

A. I'm sorry.

Q. Can I direct your attention to page A 97 of the Joint Exhibit 1.

A. Yes.

Q. Do you recognize what that is?

A. Yes. This is the supplementary special event permit application for the Central Park bandshell.

Q. Is that one of the forms you were referring to previously in your testimony concerning sending out additional forms to sponsors who want to use the bandshell?

A. Yes, it is.

(629) Q. And page A 98?

A. Yes. That's the second page of that form.

Q. Is that the tech information form you were describing previously in your testimony?

A. No. The tech form is pages A 95 and A 96. They are two separate forms.

Q. You're right. I'm sorry. So then A 95 is where the tech form begins and it's completed at A 96 of Joint Exhibit 1?

A. That's correct.

MS. LIBERATORE: No further questions, your Honor.

THE COURT: Plaintiff's counsel may inquire, limited, of course, to the most recent examination.

MS. FOSBINDER: Most assuredly.

REDIRECT EXAMINATION

BY MR. FOSBINDER:

Q. With regard to the supplementary special event permit application form, you want to know if a group is profit or nonprofit, is that correct?

A. That's correct.

Q. And if they are nonprofit you want to know their federal identification number, is that correct?

A. Their tax exempt number, that's correct.

Q. If they don't have one of those you want to know (630) their Social Security number. Is that for purpose of identification?

A. That's correct.

MR. FOSBINDER: Thank you.

THE COURT: Anything else?

MR. FOSBINDER: No.

BY THE COURT:

Q. Mr. Killian, I have one or two questions. At one point during your testimony—it may well have been yesterday—you said that as far as New York Sound was concerned, the cost for the season was between $24,000 to $26,000. At least, my note indicates that you said that.

A. The overall cost, when you include not only public use but use by the Parks Department and the Central Park Conservancy.

Q. Then you may have dealt with the discrepancy that I am about to call to your attention, but I would need your further explanation. You then said a little later on that New York Sound gave you an overall bid for a season of 50 shows which translated on a daily basis to $400 a day.

A. That's correct.

Q. Did you also say that?

A. That's correct.

Q. $400 a day times 50 shows is $20,000.

A. $20,000.

(631) Q. Why is the total cost $24,000 to $26,000?

A. As I believe I testified yesterday, it was between 50 and 60 shows. The actual number of shows was somewhat higher, I believe.

Q. I see.

A. I am just remembering the dollar figures. But that was their original bid and we had extra shows. I believe, specific to, for instance, Mr. LaSelva renting microphones, he paid the additional cost there, but that came through New York Sound. He did not go out and get them. New York Sound went out and got them, but he paid the cost.

Q. Let me put it to you this way: When an event, a privately sponsored event for which the New York Sound system has been used, is completed does New York Sound then send you an invoice to cover its services for that particular event?

A. That's correct, though oftentimes they gang an invoice up for a number of performances.

Q. Right. When they bill you for a particular event, whether it's an invoice for a single event or an invoice which covers a number of events, are the events billed on the basis of the actual hours that the events lasted or is it on the daily basis?

A. It's on the daily basis.

(632) Q. So the charge will be the same whether the event took two hours or six hours, true?

A. That's correct. However, obviously, what the department receives for that will differ.

Q. True. Were you present, sir, at the Rock Against Racism concert in 1986?

A. In 1986, for the entire event.

Q. Were you there at the beginning?

A. I was there near 6 a.m. and I left near 9:30 p.m.

Q. Did a time come during the actual performance when you regarded the sound level as excessive or impermissible?

A. Yes.

Q. Did you take any action with respect to that?

A. Our feeling, and when I say "our," on the advice of counsel, given that we had been in litigation, was to allow Rock Against Racism to conduct the event as they wished as long as there were no safety hazards involved or imminent possible injury to park users. So our feeling—and I requested this of both the New York State Police Department and our own Park Enforcement Patrol—was that we allow the event to continue as Rock Against Racism saw fit.

Q. All right. Thank you.

(633) THE COURT: Anything further?

MS. LIBERATORE: Could I inquire, your Honor?

THE COURT: Yes.

RECROSS-EXAMINATION

BY MS. LIBERATORE:

Q. Mr. Killian, could you explain why the $100 per performance hour sound system fee was selected rather than a per diem fee, as charged by New York Sound?

A. The question was raised in a meeting. It would be dangerous for a group that perhaps was using the facility for one hour. They may not have the resources to pay $400 for an event. That fee, however, was decided upon when we were in the bid process and the bids ranged—a large fluctuation, you know, $600, $700. So we weren't entirely sure what that final cost would be. However, we felt that we did not want to exclude anyone from using the facility if they were going to use it for a short period of time, to tack on a large cost to them.

Q. So then your concern in establishing the $100 per performance hour fee was a sense of fairness towards people who would want to use the bandshell?

A. That, in addition that we needed—we felt we needed a specific number to give people so that they could plan and predict upon that and it wouldn't fluctuate. But what you're saying is true.

(634) Q. Was it also an effort to perhaps let additional groups that otherwise would be unable to pay a higher rate use—

THE COURT: Don't lead. Were there any factors in his mind, and if so, what were they.

Q. Were there any other factors in your mind when you were discussing the fee arrangement?

A. We hoped to make it affordable for people who wanted to present performances there. They could get a high quality sound system as a very reasonable cost, without profit or loss on the part of the Department of Parks and Recreation.

Q. And at the end of the 1986 season did your prorating of fees to private sponsors in fact correspond to what was paid by the Department of Parks to New York Sound for those privately sponsored events?

A. Again, there was a slight loss on the part of the Department of Parks and Recreation.

MS. LIBERATORE: No further questions, your Honor.

THE COURT: Anything further of this witness?

MR. FOSBINDER: I think not.

THE COURT: All right, Mr. Killian. Thank you. Your testimony is concluded and you may withdraw.

THE WITNESS: Thank you.

* * *

Transcript of Proceedings on March 23-25, 27, 30, 31 and April 1, 1987
Testimony of Robert Russo,
Witness on Behalf of Plaintiff

* * * (636) ROBERT RUSSO,

called as a witness by the plaintiff, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FOSBINDER:

Q. Good morning, Mr. Russo.

A. Good morning.

Q. Could you tell me who you are currently employed by?

A. Yes. I am employed by the New York City (637) Department of Parks and Recreation.

Q. And what is your position?

A. It is deputy commissioner for operations.

Q. As deputy commissioner for operations what are your duties?

A. I have responsibility for park maintenance and operations for the City of New York park system.

Q. Could you give me a little more information about how your duties involve the permit process regarding special event permits for Central Park?

A. One of the areas under my supervision is recreation. It's a division of the agency. Special events are part of that division, the office of special events.

Central Park is a somewhat similar situation but there is a difference. The difference is that Central Park has an administra-

tor's office. The administrator has a number of—it's sort of a slice of the system, Central Park, that has its own hierarchy because of its special needs. So it's somewhat— it's a little bit different.

Q. Do you oversee police operation in Central Park?

A. No, I do not. That's the New York City Police Department. There is a Central Park precinct within the confines of the park.

Q. Are you involved with that?

A. Only involved with them as liaison between (638) agencies. But no, I have no authority over the Central Park police.

Q. Could you tell me when you first met Mr. Killian, approximately?

A. I guess it was about two years ago, my best recollection.

Q. When did Mr. Killian become an employee of the Parks Department?

A. I don't—maybe 18 months, something like that, 18 months, two years.

Q. Did you have occasion to discuss with Mr. Killian new guidelines for the Naumburg Bandshell?

A. Yes, I did.

Q. Can you tell me when you had discussions with Mr. Killian, approximately, and what you recall was the substance of those discussion?

A. I don't recall exactly when Mr. Killian was hired, but I would say within the first six months after he was hired. He was hired to manage the bandshell because of the multitude of events at the bandshell and because we also—his background is in producing events. In his former occupation he did that. We were

looking for someone who could not only manage events that we had permits for at the bandshell, people who apply during the year, but also to bring in additional events, and he has done that.

(639) Q. Do you recall any of the substance of your conversation with Mr. Killian with regard to the proposed or now Naumburg Bandshell regulations?

A. Yes. We spoke about the need to have some regulations that could be presented to people who wanted to apply for a permit at the bandshell that would be uniform, and Joe Killian then, I think with others, drafted a proposed list of regulations and we reviewed it.

Q. Were you involved in the process of drafting those regulations?

A. Not—I didn't sit down and write them. We discussed them.

Q. Did you discuss with Mr. Killian, to the best of your recollection, sound problems regarding the bandshell?

A. Yes. I told him that we had lots of groups who came in and had varying abilities to produce an amplified sound. Some didn't amplify at all, some had—would come with their own systems, and I thought that we should do something to make this more efficient, to manage it for all the groups, for each and every group that came in. Some were unable, for example, to even get somebody to amplify sound for them and they would come to us and ask us to do it and we were unable to do that. We didn't have the capability at the time to really do it well.

Q. Did you tell Mr. Killian that there had been a (640) problem with groups using the bandshell using inadequate quality equipment or bad technique for sound amplification?

A. I don't recall saying that specifically.

Q. Did you discuss with Mr. Killian the fact that the city had had a lawsuit filed against it which was still in process at that point regarding the bandshell?

MR. PINES: Your Honor, I object on the grounds of relevance.

THE COURT: Overruled.

A. I am sure that I did talk to him about it. I don't recall the specific time or the conversation, but I am sure that I told Mr. Killian all about that.

Q. When would that have been, approximately?

A. Probably sometime during the first six months or so.

Q. Can you make any better estimate as to how much prior to the May event in 1986 you discussed this with him?

A. No, I don't remember. Within the first six months I would say.

Q. Do you remember what you told Mr. Killian the problem of the lawsuit was in terms of the city's problem?

A. Yes. I believe what I told him was that it was a problem of loudness.

Q. Did you inform Mr. Killian that the court had not allowed the city to impose an arbitrary restriction on (641) Rock Against Racism regarding volume level?

MR. PINES: Your Honor, I object to the form and relevance.

THE COURT: The witness may be asked what it was that he told Mr. Killian about the litigation. I would prefer to have the words come from the witness' mouth.

Q. Do you have any recollection of what problems you told Mr. Killian you had regarding the lawsuit or what problems the lawsuit posed for the city?

MR. PINES: Your Honor, I object to the form of the question.

THE COURT: No, I will take it.

A. Can you say that again, please?

THE COURT: Read it back.

(Question read)

A. Yes. I think what I said to Mr. Killian was this, that we had a disagreement, and it had gone to court, about the volume of the sound amplification at this event, Rock Against Racism, and that Parks Department people, myself included, felt that it was excessive, and that we had gotten some complaints over the years, several years, about the excessive sound, and we were trying to determine whether or not we had the authority to regulate, within reason, not just Rock Against Racism, but how loud sound can be in a public park.

(642) Q. Did you discuss with Mr. Killian the feasibility of a specific decibel limitation?

A. I don't remember discussing that specifically, although I may have told him that that had been tried, that we had at least one year that I can remember done some measuring of sound, although that was problematic as well, because it is—that is not—I don't think it's as purely scientific as we might have all felt it was at one time.

Q. Do you recall whether or not you discussed with Mr. Killian what your understanding of the limits on the city's ability to regulate sound were at that point, as the court case evolved?

MR. PINES: Your Honor, I object to this inquiry. The issue in the case is whether the regulations are in fact constitutional. That's a finding that the court should make. Whether this witness has an opinion on that issue I think is completely irrelevant. His thinking about the wording of the regulation or the guidelines is

certainly relevant, but the conclusion about the legality is really reserved for the court.

THE COURT: I am not certain that that was the thrust of the question. Read the question back.

(Question read)

THE COURT: Yes. I will sustain the objection. (643) His understanding as to legal limits is I don't think pertinent. But I will grant counsel some latitude in inquiring as to how these regulations came into being in the context of the pending litigation.

MR. FOSBINDER: Okay.

Q. Do you recall any other problem that you felt existed with regard to the bandshell that you discussed with Mr. Killian?

A. Yes. The regulations say a lot more than—discuss a lot more than sound for a lot of events, and over the years my feeling has been that we have packed the bandshell, so we have a suggestion, a limit on the number of people who shall be in the bandshell for an event.

So we felt that that was a problem, the number of people, because there is a pass-through just west of the bandshell which can get blocked called the dead road in Central Park. We also have roller-skating on that road and volleyball playing. So we felt that the size of the crowd should have something to do with what the venue is, where in the park or where in the city an event is conducted. There is a difference, for example, between a group that would attract 100,000 and one that would attract 500.

So that was one aspect of the regulations. Sound was another, which I think I mentioned before. I think there is a liability clause in there about having (644) insurance. Those kinds of things. They are broader than just sound regulation.

Q. To get back to sound for one more moment, did you suggest to Mr. Killian that in the course of writing the regulations he

should attempt to create the regulations in such a manner that the city would have the power to control the sound level at the bandshell site?

A. Yes.

Q. Did you make any suggestions to Mr. Killian as to how that might be accomplished?

A. We discussed a number of options, I guess ranging from at the time—we talked about people bringing equipment in and having a predetermined or agreed upon decibel level. But, however, we discounted that because all people couldn't do that or didn't want to do it.

We knocked around a number of ideas. We thought that the best one was the one that we decided upon, which is to get an outside group that was recognized, being independent, but a very reputable sound amplification outfit, and see if they would come in and do this for us, because we felt it was outside of our expertise and outside the expertise of a number of groups or even the availability of a number of groups that come into the bandshell.

There are large events and small events at the (645) bandshell. Some are dance events that don't even require much amplification. There is a whole host of things at the bandshell. We have a full concert series there in the spring and summer.

Q. Do you have any specific knowledge of any other individuals in the Parks Department who Mr. Killian consulted with regarding these new regulations?

A. Yes.

Q. Who?

A. Well, he certainly consulted with William Dalton, who is the head of the Urban Parks Service, myself, Kate Pearson, I think, although she may not have been on the board. Whoever was the special events director at the time. It may have been Kate

Pearson, it may have been Alice Cashman. I am not certain whether Alice Cashman had left at that point. One of the two.

Q. If we could turn to the previous year, could you give me your best recollection of how the permit process worked during the prior year?

A. Prior—which year?

Q. Prior to Mr. Killian's arrival.

A. Yes.

MR. PINES: Your Honor, I would object as cumulative. We have already had extensive testimony on this process.

(646) THE COURT: I am not going to go through it all over again, but perhaps to test the accuracy of other witnesses' testimony I will permit it up to a point.

MR. FOSBINDER: Thank you.

A. Do you want me to respond now?

Q. Yes.

A. Okay. I preface this by saying one of the reasons we hired Joe was to have what I refer to as one-stop shopping. Prior to Joe's arrival it was not difficult but it was cumbersome, I think, to get a permit for the bandshell, because one would have to go to our office on 61st Street in Manhattan to see Sheldon Horowitz and get a permit application, which would have to be filled in at the time, then I believe there is a separate permit for sound that the Police Department issues. Those permits would necessarily have to be reviewed by the person responsible for events in Central Park, and specifically the bandshell, which is a different person from Sheldon Horowitz.

I felt that that was cumbersome and was unnecessary, that we should have some one person to whom all applicants can come and get the necessary papers and do it speedily, at least, more

speedily than it was done in the past. And also there are permits for vehicles if you're going to bring vehicles in the park and I just (647) didn't think that people should have to chase around and go to different people for these things.

So we unified that under Mr. Killian. But the obverse was true prior to his coming. You had to go to two or three places to get these papers and fill them out. It was silly.

Q. Could you tell me how the permit approval process worked in the year prior to Mr. Killian, as you best recall it, with specific attention to what your role in that process was?

A. Maybe I should answer that—back into it. My role was virtually negligible. However, if we had a major special event, a major concert, which would mean most likely something outside the bandshell, such as the Great Lawn, where we would have—expect a large crowd, have to have lots of other agency involvement, notably the police, sanitation, I would be involved in those negotiations with the producers or promoters of the event. But on individual permits for the bandshell, I would rarely, rarely see them, even then, even under the old system.

Q. Could you tell me what the old system was, Mr. Russo?

A. You probably should understand that I had a different job at that time. But anyway, the old system was as I described it. You would go to 61st Street, get the (648) permit application, fill that out, do what was required by it. That would be sent to the building I work in, which is in the Arsenal in Central Park, to the special events person, who would review it. The person who was applying would be directed to get a sound device permit, I believe it's called, from the Police Department. They would probably do that the same day in most cases because it's right in the park. And I think the sign-off ultimately was from the Manhattan borough office, whoever was the borough park commissioner for Manhattan I believe signed off ultimately on them.

Q. Let's just go directly to your best recollection of the Rock Against Racism permit application in that year. Were you consulted with regard to that application?

A. This is for 1984 or '85?

Q. In 1985.

A. 1985?

Q. 1985.

A. Yes. In 1985 we were in court. That was the year we were in court. Yes.

Q. Can you tell me who consulted you with regard to the Rock Against Racism permit?

A. I don't remember. It may have passed across my desk. It doesn't mean somebody consulted me. It may have come across my desk. It would have been something that I (649) would pay attention to, having gone to court or going to court. Of course, it would be sent—something that is known about the agency.

Q. Did you favor granting the permit or did you disfavor granting the permit to Rock Against Racism for the bandshell that year?

MR. PINES: Your Honor, I object to the form of that question on the grounds that he can ask if he was involved or if he had any opinion about it. On the basis of the testimony it's not even established that he had any role in that decision-making process.

THE COURT: I will overrule the objection to the form. Read the question back.

(Question read)

THE COURT: Or neither of the above.

A. I think I had mixed opinions, actually, in that year. If I could—recollecting, if I could have cut out the loudness part of

the permit, I would have been opposed to giving permission to allowing the group to amplify its own sound.

As far as the event is concerned, I had no problem with the event. It has occurred for years and I would not disapprove that. I didn't then and I don't now.

Q. Do you recall telling the court that this group was dishonorable?

(650) A. Yes.

Q. Did this feeling about the group Rock Against Racism play a role in your decision, whatever part you may have played in the decision process? Let me rephrase that.

Was this one of the reasons for the rejection of the permit application of Rock Against Racism, your belief that this group was dishonorable?

MR. PINES: Your Honor, I object to the form. There is no foundation for this question. Counsel hasn't even established what role if any Mr. Russo had in deciding—

THE COURT: Sustained.

MR. FOSBINDER: I am at a loss, your Honor. In 1986 Mr. Russo testified in response to a question and I am trying to elicit whether or not his recollection is different today. He testified in response to a question "I want to understand"—

MR. PINES: Your Honor, I object. If counsel wants to elicit testimony, that's one thing. He is now testifying. I would suggest that he ask questions.

THE COURT: First establish as a matter of foundation, Mr. Fosbinder, that the witness participated in the decision.

Q. Is it your testimony at this point that you did not participate in the decision regarding the Rock Against Racism permit?

(651) THE COURT: In 1985.

A. No, that's not my testimony.

THE COURT: All right. Go ahead.

Q. Could you tell me what the reasons for the rejection of that permit application were?

MR. PINES: Object to the question. There has not been a foundation established as to whether there was a rejection.

THE COURT: Overruled.

A. Yes. As I testified in the past, my experience with the group, the culmination of it—and I did say that they were dishonorable—had to do with a number of things.

I would also like to say, by the way, that the issue, the sole issue—I think that my opinion has very little to do with this at this point and the sole issue is loudness of sound.

But why I said the group was dishonorable was the culmination of a number of things, such as having—we had, for example, a meeting in the Central Park precinct with I think Dean Tuckerman was there and others from the group and myself and some of the police people, where we agreed—I think we had an agreement to meet at the bandshell the morning of the event and set the sound, and that really never happened, although we were there. We had people from—I don't recall—from the Environmental (652) Control Bureau.

I mentioned that I felt that the group made it very difficult for us to work with them. We asked repeatedly, for example, for a bond, which we ultimately got almost literally at the eleventh hour before the event, and it was far less than what we asked for.

We had many, many meetings with the group over the years, in the Borough of Manhattan south at the police, in the north at the arsenal, lots of different places, and the negotiations were always very difficult, never wanted to agree, and then when we did agreed they violated the agreements.

I think almost every year that I had experience with the concert, the performance, the event extended over the time that we had agreed that it should be ended. More vehicles were always brought into the park in the events that I remember than we had agreed to. We asked the license plate numbers of the vehicles so we could give them permits, so the people who were at the gates when the park is closed can let the vehicles in. They were never submitted. Vehicles were unregistered that came into the park. Vehicles were given summonses that were never paid. Environmental Control Board summonses were given out. They were never paid, they were defaulted.

That's why I say they are dishonorable, some of (653) the reasons, that's why I said it.

Q. Were you involved in the decision to offer the alternate sites of Randall or Ward Island to the group?

MR. PINES: Object on the grounds of relevance.

THE COURT: It certainly doesn't bear on the validity of the present regulations, does it, Mr. Fosbinder?

MR. FOSBINDER: No, that's true.

THE COURT: If your suggestion is that it bears on compensatory damages, I don't see how it does that either, because they didn't go to the alternate sites.

MR. FOSBINDER: It would only bear on them in the sense that the city did not offer an equivalent substitute to Central Park and therefore Rock Against Racism would be reasonable in viewing themselves as being turned down. In essence, the city said "We're not really turning you down, we're just giving you the alternate equivalent site," and in order to prevent that as a defense I want to establish where the sites were.

THE COURT: The prior record of what the plaintiffs complained of and what the defendants did forms a part of this trial

under Rule 65. It seems to me that subject has been adequately covered.

MR. FOSBINDER: Okay. That's fine. If that's the situation, there is no problem with that. If I can have a minute.

(654) THE COURT: Yes.

(Pause)

MR. FOSBINDER: No further direct.

THE COURT: All right. Counsel for defendants may inquire.

CROSS-EXAMINATION

BY MR. PINES:

Q. Mr. Russo, directing your attention to the years prior to 1986, do you recall whether there were ever any disagreements on the day of the event with RAR over the regulation of sound?

A. Yes. But may I say something about this? The events—and it may be true for others in this room—tend to mesh over the years. It's very difficult for me now, with the hundreds of events that we have in the park, to distinguish between '82 and '83 or '83 and '84. So I can answer you by saying yes, that we always had a give-and-take about the volume of sound.

We would go to various people—it was different people—over the years and ask them to turn it down when it got very loud—when I say very loud, you could hear it on Central Park West—and sometimes they would comply and sometimes they would not, sometimes they would comply and turn it up again, that kind of thing.

Q. Was there in any of the years you can remember (655) ever a single designated person that RAR provided to you as the person that would be responsible for resolution of sound issues?

A. I think in '85 Christy Robb was the person that we dealt with mostly, and I would say—that was probably the first year that we had one person who we could—who was actually there and who could be reached during the event or during all of the event.

Q. In years prior to that was there one person?

A. Well, it was principally Dean Tuckerman, but not all the time. You would talk to different people. You know, we would have to reach out to different people. It was difficult.

Q. Why was it difficult?

A. Because you get a runaround, essentially is what would happen. You have to understand, we have a command post truck

right adjacent, almost adjacent, 30, 40 feet from the stage or a vehicle or some identifiable park police operational headquarters that we're always reachable at. So it's easy to find us but not always easy to find not only Rock Against Racism, other events people.

Q. In your dealings with Rock Against Racism prior to 1985, when you were dealing with different representatives of the group, did you encounter any variation in the attitude of the group in terms of their (656) cooperation with you on the sound level issue?

A. Variation from year to year or variation during the day or—

Q. From person to person.

A. Yes. My sense—this is an opinion—my sense was that there was some dissension between and among members of—representatives of that group about the loudness of sound.

Q. When you asked the different representatives to turn down the sound did you get compliance?

A. Not always.

Q. Can you describe what happened?

A. Well, you should also understand that it was not always me doing this and it was probably rarely me. Usually the police or some police official—

Q. Let me ask you, did you observe any incidents involving discussions of sound with RAR, specifically with respect to compliance with requests?

A. Yes.

Q. Can you describe those?

A. They were argumentative. I mean, generally an argument. Many of these things, an argument ensued about the loudness.

Disagreement, certainly. And things would be said from the microphone. I recall one year somebody would get up and say "Hey, the cops want us to turn the (657) sound down," and it would rile the crowd up and the crowd would yell, and it's not nice to be there when this happens. And it wasn't "the cops," you know, they didn't necessarily say "the cops."

Q. What do you mean by that?

A. There would usually be some slang, like pigs, something like that.

Q. Based upon your experience, would you feel it reasonable to rely upon RAR's voluntary compliance now and in the future with requests to lower the sound voluntarily?

A. Oh, no. There has been a history of—absolutely not. There has been a history of either ignorance or—they don't want to lower the sound. They want the sound I think as loud as it can possibly go. I mean, it's just the opposite of our intention.

Q. Do you have any personal opinion regarding the content of RAR's speech?

A. No, I really—no. I don't really know. I mean, it's hard—I don't really know what it is. I have listened to it, there are speeches and music, and it kind of all blends together. I really don't. The issue for me is loudness. I have to be able to—there has to be a point where I think one group's rights to amplify sound to the ears of all the other users in the park—somebody has to say "I think this is loud enough." Somebody has to say (658) that. I think it should be the Parks Department.

MR. PINES: No further questions.

THE COURT: Mr. Fosbinder?

REDIRECT EXAMINATION

BY MR. FOSBINDER:

Q. In 1984 a specific sound level maximum was requested by the Parks Department. Were you involved in the process of determining what that level should be?

MR. PINES: Your Honor, I object to the form of that question.

THE COURT: Is there no foundation in the record for it?

MR PINES: In fact—

THE COURT: I am frankly not certain.

MR. PINES: My recollection is there was testimony from Christy Robb that at one point RAR wanted to have a sound level set and I don't think there was agreement as to what that level would be. I don't think there is any testimony about a sound level having been—

MR. FOSBINDER: Mr. Schulman's testimony was quite extensive. You indicated that that is incorporated—

THE COURT: Oh, yes. Any prior testimony on the motion for a preliminary injunction forms a part of this trial record.

MR. FOSBINDER: That was my understanding, and (659) given that, I think there is a substantial foundation that the city suggested a specific number and that they required RAR to abide by it or issue a citation, which they did.

MR. PINES: Your Honor, I would simply then request that reference be made to the testimony rather than presume Mr. Russo's familiarity with testimony given in 1985.

MR. FOSBINDER: While Mr. Pines was not here, Mr. Russo was. If he doesn't recall—

THE COURT: Can you give me a reference to the transcript of the Schulman testimony?

MR. FOSBINDER: Page A 163 it begins. A173, lines 15, 16 and 17, "Tried to keep that level around 75, 77, 78." Page A 174, line 10, "At that time the Police Department—we decided that something between 75 and 78, really, it was around that level, would be more than sufficient for people in the audience to enjoy the concert and for people outside the park not to be disturbed."

MR. PINES: Your Honor, that conclusively demonstrates it was not the Parks Department and there is no testimony there that was a level set by the Parks Department. It may have been desired by DEP, by Mr. Schulman, by the Police Department.

MR. FOSBINDER: It says "we." You have to read through all the testimony. I think it's pretty clear the "we" (660) was referring to—

THE COURT: Now that we have the Schulman testimony before us, put such questions to Mr. Russo as you think that testimony justifies.

MR. FOSBINDER: Okay.

Q. Do you recall being involved in any way in the decision to request RAR to abide by a 75 to 78 decibel level maximum for the 1984 RAR event?

MR. PINES: Your Honor, I would object to that as beyond the scope of cross. He talks exclusively about 1985.

THE COURT: I will permit it.

THE WITNESS: May I answer?

THE COURT: Yes, you may.

A. I believe, Mr. Fosbinder, that that year was the year in which the meeting that I referred to that occurred at the Central Park police precinct took place, and it was decided there that the parties, which were the police, the parks and RAR, would meet early in the morning of the event in the park to decide on an agreeable upper limit, and the legal division—there was an attorney

from the legal division of the Police Department who was there who got in contact with ECB, Environmental Control Board, and had them—had some technician or technicians come down on that morning, but I wasn't there that morning. I wasn't at the (661) meeting where the thing that you referred to, this upper limit, was established, if it was established.

Q. You just said, if I recall correctly, that these people would meet the day of the event to establish an agreeable level. What at that point would have been RAR's option if they didn't agree to the agreeable level?

MR. PINES: Your Honor, I object on the grounds that it's speculative. It is also totally irrelevant. This is not what the current standards are.

MR. FOSBINDER: It's not speculative. If there was some sort of procedure that they could follow to appeal this decision I would like to know about it.

THE COURT: We're back in 1984?

MR. FOSBINDER: Yes

THE COURT: We are dealing now with the 1986 regulations. I will sustain the objection.

MR. FOSBINDER: That's it.

THE COURT: Anything further from the defendants?

MR. PINES: No, your Honor.

THE COURT: Thank you for your attendance, Mr. Russo. You're excused.

THE WITNESS: Thank you, your Honor.

(Witness excused)

THE COURT: Any further witnesses that the parties wish to call?